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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

INDU GULATI,

Petitioner,

vs.

MICHAEL B. MUKASEY, Attorney General,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 8 U.S.C. 1252(a)(2)(B)(ii) removes judicial review over actions "the authority for which is specified under this subchapter to be in the discretion of the Attorney General . . . ." An Immigration Judge's authority to continue removal proceedings is nowhere mentioned in this statute. The question presented is:

Did the Seventh Circuit err in holding, contrary to the position of eight of its sister circuits and the Attorney General, and in agreement with two other courts of appeals, that § 1252(a)(2)(B)(ii) precludes judicial review of an Immigration Judge's decision to deny a continuance in a removal proceeding?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals for the Seventh Circuit were Petitioner Indu Gulati and Respondent Attorney General of the United States.

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INTRODUCTION

The decision below applying Section 1252(a)(B)(ii) of Title 8, U.S.C., to strip the courts of appeals of jurisdiction to review denial of continuances by Immigration Judges (IJ) deepens an eight-to-three split in the circuit courts on an important and recurring issue of immigration law and federal jurisdiction that affects hundreds or thousands of litigants each year. The Attorney General acknowledges this split. Pet App. 59a-61a. The Attorney General also has announced—previously and in this case—a firm position that the majority view is correct and that the position of the court below is wrong. Pet. App. 61a.

In light of this Court's special concern for uniformity in the application of laws in the area of immigration, *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001), review by this Court is clearly warranted. Indeed, under the circumstances, this may be an appropriate case for summary reversal.

OPINIONS BELOW

The slip opinion of the court of appeals, Pet. App. 1a-7a, No. 06-3221, is available at 2007 WL 2988632 (7th Cir. Oct. 15, 2007). The decision of the Board of Immigration Appeals, Pet. App. 8a-10a, is *In re Gulati*, No. A97-331-330 (B.I.A. July 21, 2006). The oral decision of the Immigration Judge, Pet. App. 11a-15a is not reported.

JURISDICTION

The court of appeals issued its decision on October 15, 2007. Pet. App. 1a-8a. On November 23, 2007, Petitioner filed a petition for rehearing and rehearing *en banc*, which was denied on December 27, 2007. Pet. App. 25a-26a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 242(a)(2)(B)(ii) of the Immigration and Nationality Act, as amended by § 306(a)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, provides that:

> (B) Denials of discretionary relief
>
> [N]o court shall have jurisdiction to review—
>
> * * *
>
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. § 1252(a)(2)(B)(ii).

STATEMENT

Petitioner, Indu Gulati, is a native and citizen of India. She last entered the United States on or about December 8, 1997, as a non-immigrant visitor and stayed in the United States beyond the time allowed by her visa. Petitioner was personally served with a

Notice to Appear by the Department of Homeland Security on August 24, 2004, which charged her with removability on the basis that she stayed in the United States longer than permitted. At a proceeding before an Immigration Judge ("IJ") on June 16, 2005, Petitioner conceded removability on that basis. *See* Pet. App. 18a.

An alien who has overstayed her visa must ordinarily leave the country before applying for lawful permanent residence. *See* CHARLES GORDON, ET AL., IMMIGRATION LAW AND PROCEDURE § 31.01 (1985 & Supp. 2007). However, Section 245(i) of the Immigration and Nationality Act ("INA") as amended by the LIFE Act Amendments of 2001, provides that an alien may seek an adjustment of status without leaving the country if, *inter alia*, an employer filed a petition for labor certification on her behalf before April 30, 2001. 8 U.S.C. § 1255(i)("Section 245(i)").[1]

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[1] Section 245(i) of the INA, 8 U.S.C. § 1255(i), as amended provides in pertinent part:

(i) Adjustment of Status of certain aliens physically present in the United States.

(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States . . .

(B) who is a beneficiary . . . of . . .

(ii) an application for a labor certification under section 1182(a)(5)(A) [INA § 212(a)(5)(A)] of this title that was filed pursuant to the regulations of the Secretary of Labor on or before [April 30, 2001]: and

(C) . . . is physically present in the United States on December 21, 2000 [date of enactment of the LIFE Act Amendments of 2000]

may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence.

By regulation, the beneficiary of a labor certification is "grandfathered" or "section 245(i) eligible" if the petition filed on her behalf was "properly filed, meritorious in fact, and non-frivolous." 8 C.F.R. § 245.10(a)(3); *see also* Interoffice Memorandum, William R. Yates, Acting Associate Director for Operations, United States Citizenship and Immigration Services, *Clarification of Certain Eligibility Requirements Pertaining to an Application to Adjust Status under Section 245(i) of the Immigration and Nationality Act* 2, Mar. 9, 2005, *available at* http://www.uscis.gov/files/pressrelease/245iClarification030905.pdf (laying out the requirements for grandfathering under Section 245(i) and its implementing regulations) [hereinafter Yates Memo].

After conceding removability, Petitioner requested a continuance of the removal proceeding in order to allow a new employer to file a new Alien Labor Certification, pursuant to Section 245(i). This new Certification was necessary because a prior Labor Certification, properly filed under Section 245(i) before April 30, 2001, sat unaddressed by the California Workforce Development Agency until after the original employer went out of business.

The timely filing of the first Labor Certification caused Ms. Gulati to be grandfathered within the terms of Section 245(i), even after the original sponsoring company went out of business: "A visa petition that was properly filed on or before April 30, 2001, and was approvable when filed, but was later withdrawn, denied, or revoked due to circumstances that have arisen after the time of filing, will preserve the alien beneficiary's grandfathered status . . . ."

8 C.F.R. § 245.10(a)(3). Having been thus grandfathered, Ms. Gulati could subsequently adjust status on the basis of a new Labor Certification. "A grandfathered alien is not limited to seeking adjustment of status solely on the basis of the qualifying . . . application for labor certification that initially grandfathered the alien." Yates Memo, *supra*, at 2.

The IJ denied Petitioner's request for a continuance on June 16, 2005, stating, "I would deny any request for a continuance in the exercise of discretion, because the respondent simply remained in the United States longer than permitted and still does not wish to depart." Pet. App. 13a. Further, the IJ, reaching an issue not properly before him, stated that if Ms. Gulati appealed his decision to the Board of Immigration Appeals ("BIA"), "this Court would not grant permanent resident status in the future in the exercise of discretion, solely based on respondent's delaying her departure from the United States by filing a frivolous appeal." Pet. App. 15a. Finally, the IJ granted Petitioner voluntary departure pursuant to 8 U.S.C. § 1229(c), in lieu of removal from the United States. Pet. App. 22a-23a.

Petitioner made a timely direct appeal of the IJ's denial of the continuance to the BIA. On July 21, 2006, the BIA affirmed the IJ's denial of the continuance, and ordered Petitioner to voluntarily depart within sixty days, on or before September 19, 2006. *See* Pet. App. 9a. In addition, the BIA "specifically disapprove[d] of the Immigration Judge's prejudgment of an issue not before him," in his statement that he would deny adjustment of status if

the case should come back to him in the future. But it concluded that this was harmless error. *Id.*

On August 17, 2006, Petitioner timely filed with the Seventh Circuit a Petition for Review, and also, on September 5, 2006, filed a Motion for Stay of Voluntary Departure. The Seventh Circuit granted the Stay Motion on October 2, 2006, *see* Pet. App. 27a-28a, on which date Petitioner had fourteen days remaining in her sixty-day voluntary departure period.[2]

On October 15, 2007, the Seventh Circuit issued a nonprecedential decision holding that it lacked appellate jurisdiction to review Petitioner's challenge to the denial of the continuance.[3] The court held that 8 U.S.C § 1252(a)(2)(B)(ii), a jurisdiction-stripping provision of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA"),[4]

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[2] The BIA granted Petitioner 60 days to voluntarily depart on July 21, 2006. When she filed the stay Motion on September 5, 2006, 46 days had elapsed. When a stay is granted, a court stops the running of the voluntary departure period as of the day the stay was filed. *See Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 654 (7th Cir. 2004); *Falaja v. Gonzales*, 418 F.3d 889, 899-900 (8th Cir. 2005).

[3] The Seventh Circuit also denied Petitioner's due process challenge to the IJ's statement that he would deny any future discretionary relief to the Petitioner. Pet. App. 5a.

[4] Pub. L. No. 104-208, 110 Stat. 3009-1, 3009-546-3009-724. IIRIRA adopted a number of jurisdiction-stripping provisions, in addition to 8 U.S.C. § 1252(a)(2)(B)(ii), the provision at issue in this case. *See* IIRIRA §§ 301(b), 302, 304(a), 306(a), (d), 345(a), 348(a), 349, 371(b)(6), 604(a), 110 Stat. 3009, 3009-576-77, -579, -596-97, -607, -612, -

bars judicial review of denials of continuances, relying on its recent decision in *Ali v. Gonzales*, 502 F.3d 659 (7th Cir. 2007), Pet. App. 29a-42a.

In *Ali v. Gonzales*, the Seventh Circuit gave two bases for its conclusion that it had no jurisdiction to review the denial. *First*, it considered the text of the jurisdiction-stripping provision, which reads, in pertinent part, "no court shall have jurisdiction to review . . . any other decision or action of the Attorney General . . . the authority for which is *specified under this subchapter* to be in the discretion of the Attorney General." Pet. App. 30a (quoting 8 U.S.C. § 1252(a)(2)(B)(ii))(emphasis added). The court acknowledged that:

> [w]hile it is true that continuances are specifically mentioned only in the administrative regulations, *see* 8 C.F.R. § 1003.29, an immigration judge's authority to grant or deny a continuance is statutory; it derives from 8 U.S.C. § 1229a, which confers upon immigration judges the plenary authority to conduct removal proceedings.

Id. The court reasoned that even though the power to grant or deny continuances is not explicitly specified in the relevant subchapter, it is granted to IJs by a regulation enacted pursuant to IIRIRA and is therefore statutorily conferred and beyond judicial review. Pet. App. 30a-31a.

637-38, -639, -645, 690-91, (codified as amended in scattered sections of 8 U.S.C.).

> [A]n immigration judge's denial of a continuance motion is a discretionary "decision or action" the "authority for which" is committed to the immigration judge by the relevant subchapter . . . and the jurisdictional bar in 8 U.S.C. § 1252(a)(2)(B)(ii) generally precludes judicial review.

Second, the Seventh Circuit reasoned that its earlier decision in *Leguizamo-Medina v. Gonzales*, 493 F.3d 772, 775 (7th Cir. 2007), dictated this result. Interpreting the preceding subsection of the jurisdiction-stripping statute, 8 U.S.C. § 1252(a)(2)(B)(i), the *Leguizamo-Medina* court held that "[w]hen a decision is unreviewable, any opinion one way or the other on the propriety of the steps that led to that decision would be an advisory opinion." 493 F.3d at 775. The *Ali* court explicitly endorsed this approach, stating that "where § 1252(a)(2)(B)(i) removes jurisdiction to review a final immigration decision . . . , review of continuance denials and other interim orders leading up to the final decision is also precluded." Pet. App. 31a. Petitioner Ali has also filed a Petition for a Writ of Certiorari to this Court, seeking review of the Seventh Circuit's conclusion that continuance denials are unreviewable. Petition for Writ of Certiorari at 8, *Ali v. Mukasey*, No. 07-798 (Dec. 12, 2007).

Reasoning from *Ali* and *Leguizamo-Medina*, the Seventh Circuit in *Gulati* concluded that it "therefore lack[ed] jurisdiction to review the IJ's denial of Gulati's motion to continue." Pet. App. 5a.

Petitioner timely filed a petition for rehearing and rehearing en banc before the Seventh Circuit, which was denied on December 27, 2007.

On January 15, 2008, upon Application by Petitioner, Justice Stevens entered an order staying the Petitioner's period of voluntary departure pending the timely filing and disposition of her petition for writ or certiorari.

REASONS FOR GRANTING THE WRIT

In ruling that denials of continuances in removal proceedings are beyond the jurisdiction of the appellate courts, the Seventh Circuit has given the jurisdiction-stripping statute at issue an expansive reading, which is in direct conflict with the decisions of eight other circuits, in substantial tension with decisions of the United States Supreme Court, and contrary to the text of the provision at issue. The circuit courts have acknowledged that they are divided eight-to-three over a question of considerable practical importance. This Court's review is warranted to restore consistency to the nation's immigration laws.

I. THE COURTS OF APPEALS ARE DIVIDED 8-3 ON THE QUESTION WHETHER 8 U.S.C. § 1252(a)(2)(B)(ii) REMOVES JURISDICTION TO REVIEW AN IMMIGRATION JUDGE'S DENIAL OF A CONTINUANCE

As the Attorney General expressly acknowledges, Pet. App. 59a-61a, there is clear split in the courts of appeals over whether 8 U.S.C. § 1252(a)(2)(B)(ii) strips jurisdiction to review an IJ's decision to deny a continuance in removal proceedings. Eight circuit courts have held that § 1252(a)(2)(B)(ii) does not

deprive them of jurisdiction to review a continuance decision. The Eighth and Tenth Circuits, recently joined by the Seventh Circuit, have held directly to the contrary.

The First, Second, Third, Fourth, Fifth, Sixth, Ninth and Eleventh Circuits have all held that that § 1252(a)(2)(B)(ii) does not strip their jurisdiction to review continuance denials. With the exception of the Sixth Circuit, all of these circuits focus on the statute's "requirement that the discretion giving rise to the jurisdictional bar must be 'specified' by statute." *Khan v. Att'y Gen.*, 448 F.3d 226, 232 (3d Cir. 2006) (internal quotation marks omitted). Relying on the clear statement rule, the other seven courts of appeals have held that jurisdiction exists to review a continuance decision because "the language of the statute in question must provide the discretionary authority before the bar can have any effect." *Id.* Here, "the authority of an IJ to grant a motion for continuance is derived solely from regulations." *Zafar v. Att'y Gen.*, 461 F.3d 1357, 1360 (11th Cir. 2006). The Fifth Circuit has observed that the statutory language is "uncharacteristically pellucid" about which decisions are unreviewable and that this language does not include discretionary denials of continuances. *Zhou v. Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005); *Ahmed v. Gonzales*, 436 F.3d 433 (5th Cir. 2006). *Accord Alsamhouri v. Gonzales*, 484 F.3d 117, 122 (1st Cir. 2007); *Sanusi v. Gonzales*, 445 F.3d 193, 198 (2d Cir. 2006); *Lendo v. Gonzales*, 493 F.3d 439, 441 n.1 (4th Cir. 2007);

Khan, 448 F.3d at 232 (3d Cir. 2006). *See Martinez v. Gonzales,* 166 F. App'x 300, 300 (9th Cir. 2006).[5]

In contrast, the Seventh, Eighth, and Tenth Circuits have held that "[t]he jurisdictional bar [of 8 U.S.C. § 1252(a)(2)(B)(ii)] . . . applies to continuance decisions." Pet. App. 37a; *see also* Pet. App. 4a; *Onyinkwa v. Ashcroft*, 376 F.3d 797, 799 (8th Cir. 2004); *Yerkovich v. Ashcroft*, 381 F.3d 990, 993 (10th Cir. 2004). In *Ali v. Gonzales*, which was the basis for the court's analysis in *Gulati v. Keisler*, the Seventh Circuit reasoned that an immigration judge's authority to grant or deny a continuance is conferred by 8 U.S.C. § 1229a, giving IJs "plenary authority" over removal proceedings. Pet. App. 30a. The Eighth and Tenth circuits have similarly reasoned that "[w]henever a *regulation implementing* a subchapter II statute confers discretion upon an IJ, IIRIRA generally divests courts of jurisdiction to review the exercise of that discretion." *Onyinkwa*, 376 F.3d at 799. *See also Yerkovich*, 381 F.3d at 993.

The split in the courts of appeals is well entrenched and will not benefit from further development in the lower courts. In *Ahmed v.*

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[5] The Sixth Circuit concurs in the holding that continuance denials are reviewable notwithstanding the jurisdiction-stripping provisions of IIRIRA but not in the reasoning of the five other circuit courts to so hold. *Abu-Khaliel v. Gonzales*, 436 F.3d 627, 632 (6th Cir. 2006). Instead, the Sixth Circuit has reasoned that "[s]ection 1252(a)(2)(B)(ii) only applies to the portions of subchapter II left to the Attorney General's discretion, not to the portions of subchapter II that leave discretion with IJs in matters where IJs are merit decision-makers that are subject to our review." *Id.*

Gonzales, 447 F.3d 433 (5th Cir. 2006), the Fifth Circuit reaffirmed its alignment with the majority of circuits and its interpretation of § 1252(a)(2)(B)(ii) "despite an awareness of caselaw from other circuits to the contrary." *Id.* at 436 (internal quotation marks omitted). The court observed that the reading advanced by the Eighth and Tenth Circuits "was both contrary to Congress's language and has clear policy consequences." *Id.* (citations and internal quotation marks omitted). Other circuit courts holding the majority opinion have openly disagreed with the reasoning of their sister circuits in the minority regarding the scope of § 1252(a)(2)(B)(ii)'s jurisdictional bar. *See, e.g.*, *Sanusi v. Gonzales*, 445 F.3d at 198; *Abu-Khaliel*, 436 F.3d at 632; *Zafar*, 426 F.3d at 1334. Likewise in *Ali*, the Seventh Circuit noted it was joining "the minority position" among courts, and that the court's earlier decisions compelled that result. Pet. App. 31a.[6]

The sharp circuit split on the question presented in this case is all the more intolerable because it arises in the context of immigration, in which area this Court has recognized a paramount need for "the Nation [ ] [to] speak with one voice." *Zadvydas v.*

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[6] In his most recent Memorandum in Opposition to Stay, filed in this Court on January 14, 2008, the Solicitor General suggests that the conflict "may well resolve itself without this Court's intervention." Pet. App. 62a. While there is always a chance that the three minority circuits may reconsider their positions in view of the Attorney General's position on the issue, it is noteworthy that none have done so since the Attorney General asserted his current position more than a year ago. Certainly nothing in the Seventh Circuit's handling of this case, including its speedy denial of a request for rehearing en banc, suggests that soul-searching about this issue is going on in that circuit. *See* Pet. App. 25a-26a.

Davis, 533 U.S. 678, 700 (2001). The clear, direct, and mutually acknowledged split in the circuits thus demands the attention of this Court.

II. THE SEVENTH CIRCUIT'S INTERPRETATION OF THE JURISDICTION-STRIPPING STATUTE IGNORES RECENT DECISIONS OF THIS COURT, AND IS CONTRARY TO BOTH THE PLAIN TEXT OF THE PROVISION AT ISSUE AND ITS MEANING AS SUGGESTED BY IIRIRA VIEWED AS A WHOLE

A. This Court Has Directed That Courts Should Narrowly Construe Jurisdiction-Stripping Statutes And Especially So In The Immigration Context

In *INS v. St. Cyr*, 533 U.S. 289, 298 (2001), this Court held that despite specific jurisdiction-denying provisions of IIRIRA,[7] in immigration cases there still exists a "strong presumption in favor of judicial review of administrative action." In so stating, this Court reaffirmed the principle relied on in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986), that "Congress intends judicial review of administrative action . . . unless there is persuasive reason to believe that [cutting off judicial review] was the purpose of Congress." *Id.* (internal citations omitted); *see also McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 498 (1991) (recognizing the "strong presumption in favor of judicial review of administrative action"). Applying

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[7] *St. Cyr* concerned 8 U.S.C. §§ 1252(a)(2)(C) and 1252(a)(1), which were enacted as part of IIRIRA, at the same time as § 1252(a)(2)(B)(ii), the provision at issue in the instant case.

this presumption in the context of immigration, this Court's decision in *St. Cyr* expressly recognized that "[f]or the INS to prevail, it must overcome . . . the strong presumption in favor of judicial review of administrative action . . . ." *St. Cyr*, 533 U.S. at 298; *see also Felker v. Turpin*, 518 U.S. 651, 661 (1996) (declining, in the immigration context, to find a repeal of habeas jurisdiction by implication).

In *Bowen*, this Court endorsed a "clear statement" approach to any congressional action purporting to strip judicial review. *Bowen*, 476 U.S. at 671-72. This Court indicated that this approach recognizes that as a default, judicial review exists. *Id.* at 671. This Court, relying on *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967), noted that "'only upon a showing of 'clear and convincing' evidence of a contrary legislative intent should the courts restrict access to judicial review.'" *Bowen*, 476 U.S. at 671 (quoting *Abbott Labs.*, 387 U.S. at 141 (internal citations omitted)).

As *Bowen* indicates, there is a presumption of judicial review of actions taken during administrative proceedings, including removal proceedings before an IJ. *See Ardestani v. INS*, 502 U.S. 129, 131 (1991) (describing removal proceedings as "administrative"). In *Bowen*, this Court discussed at length the legislative history of the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 ("APA"), and concluded that it reinforces the presumption of justiciability. *Bowen*, 476 U.S. at 670-73. This Court noted that the Senate Committee on the Judiciary, in discussing the proposed APA, stated: "'Very rarely do statutes withhold judicial review. . . . [Without judicial review,] statutes would in effect be blank

checks drawn to the credit of some administrative officer or board.'" *Bowen*, 476 U.S. at 671 (quoting S. Rep. No. 79-752, at 26 (1945)). The House Judiciary Committee "agreed that Congress ordinarily intends that there be judicial review, and emphasized the clarity with which a contrary intent must be expressed." *Id.* The *Bowen* Court noted that the House Committee explained: "'To preclude judicial review under [the APA], a statute, if not specific in withholding [judicial] review, must upon its face give clear and convincing evidence of an intent to withhold it.'" *Id.* (quoting H.R. Rep. No. 79-1980, at 41 (1946)). This legislative history demonstrates Congress's intent to retain judicial review of administrative actions absent a clear statement removing such review.

B. The Plain Language of the Statute Makes Clear That § 1252(a)(2)(B)(ii) Does Not Strip Appellate Review of Continuance Denials

1. Decisions Concerning Continuances Are Not "Specified In This Subchapter To Be In The Discretion of the Attorney General"

Given the strong presumption in favor of judicial review, a court can only find that the jurisdiction-stripping provision removes jurisdiction from the federal courts if the language of the statute does so expressly. The provision at issue in this case precludes judicial review of any "decision or action of the Attorney General or the Secretary of Homeland Security, the authority for which is *specified under this subchapter to be in the discretion* of the Attorney General or the Secretary of Homeland Security." 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added). The

phrase "this subchapter" refers to Title 8, Chapter 12, Subchapter II of the United States Code, which includes §§ 1151-1378. *See Van Dinh v. Reno*, 197 F.3d 427, 433 (10th Cir. 1999). And "to specify" means "[t]o state explicitly or in detail." AMERICAN HERITAGE COLLEGE DICTIONARY 1307 (3d ed. 1993).

A number of provisions of the subchapter do "specify" that decisions are to be within the discretion of the Attorney General or the Secretary of the Department of Homeland Security ("DHS"). *See, e.g.*, 8 U.S.C. § 1158(b)(2)(A)(v) (giving the Attorney General discretion to determine whether an alien poses a danger to the security of the United States); 8 U.S.C. § 1181(b) (granting the Attorney General discretion to admit "returning resident immigrants" without a passport or other documentation).

But no provision of the statute or subchapter "specifies" that the decision to deny a continuance in a removal or other proceeding is within the discretion of any official. The statute simply grants authority to "[a]n immigration judge [to] conduct proceedings for deciding the inadmissibility or deportability of an alien." 8 U.S.C. § 1229a(a)(1). The IJ's authority to grant a continuance is derived solely from regulations promulgated by the Executive Office for Immigration Review in the Department of Justice. *See* 8 C.F.R. § 1003.29 (stating that "[t]he Immigration Judge may grant a motion for continuance for good cause shown."). Because authority to grant or deny a continuance is not specified in the relevant subchapter, circuit court jurisdiction to review such decisions remains intact.

The Seventh Circuit accordingly erred when it held that § 1252(a)(2)(B)(ii) strips federal courts of

the authority to review any discretionary immigration decision antecedent to a specified statutory decision, regardless of whether it is "specified under the subchapter." The jurisdiction-stripping provision is clear: "[I]t does not allude generally to 'discretionary authority' or to 'discretionary authority exercised *under this statute*,' but specifically to 'authority for which is *specified under this subchapter* to be in the discretion of the Attorney General.'" *Zhou v. Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005) (emphasis in original).

2. When Compared to the Language of IIRIRA's Transitional Rules, 8 U.S.C. § 1252(a)(2)(B)(ii) Must be Read to Create Only a Narrow Exception to Judicial Review

Reading 8 U.S.C. § 1252(a)(2)(B)(ii) with reference to the text of the transitional rules enacted as part of IIRIRA also requires that the jurisdiction-stripping provisions be construed narrowly. IIRIRA's transitional rules govern judicial review of immigration proceedings where the proceedings began before IIRIRA's effective date of April 1, 1997, and where no final order was entered by October 30, 1996. *See* IIRIRA § 309(c)(4)(E), Pub. L. No. 104-208, 110 Stat. 3009-1, 3009-625-3009-626 (1997). Only with regard to these transitional cases, Congress withdrew jurisdiction over "any discretionary decision" made pursuant to several enumerated sections of the INA. IIRIRA § 309(c)(4)(E), 110 Stat. at 3009-626 (removing judicial review of discretionary decisions in adjustment of status or removal proceedings made under INA §§ 212(c), 212(h), 212(i), 244, and 245).

In § 1252(a)(2)(B)(ii), Congress used distinctly different language in defining the permanent jurisdiction. Instead of referring to "discretionary decisions," as did the transitional rules, the new § 1252(a)(2)(B)(ii) denies jurisdiction to review acts "the authority for which is specified to be in the discretion of the Attorney General." 8 U.S.C. § 1252(a)(2)(B)(ii). It is a well-established canon of statutory interpretation that the use of different terms within a statute demonstrates that Congress intended to convey a different meaning for those terms. *See Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 174 (1993) (requiring that each word in a statute be given distinct meaning to best effectuate Congress's intent); *see also* WILLIAM N. ESKRIDGE, JR., ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 834 (3d ed. 2001). If Congress had intended to withdraw jurisdiction over all "discretionary decisions," it could have easily used the same language already enacted in the transitional rules.

3. The Attorney General is in Full Agreement with the Majority Interpretation Advocated by Petitioner

For more than a year, the Attorney General has agreed with Petitioner's position "that because continuances are referenced only in the immigration regulations, not the statutes, the discretionary authority to grant or deny a continuance is 'not specified under this subchapter' within the meaning of § 1252(a)(2)(B)(ii), and the jurisdictional bar therefore does not apply." Pet. App. 36a. At oral argument before the Seventh Circuit in *Ali*, a Department of Justice attorney "informed [the court]

that the Department of Justice now takes the position that the jurisdiction-stripping provision, § 1252(a)(2)(B)(ii), does not apply to continuance decisions." Pet. App. 35a-36a. On other occasions,[8] and most recently, in its Memorandum in Opposition to Stay, filed January 14, 2008, the Attorney General has reaffirmed this position in explicit terms. Pet. App. 61a.

Accordingly, this Court should grant certiorari to harmonize the circuits on a critical question of immigration law and to bring their interpretations of IIRIRA's jurisdiction-stripping provision in line with the words of the statute and this Court's precedent.

III. THE REVIEWABILITY OF CONTINUANCES IN REMOVAL PROCEEDINGS ARISES FREQUENTLY AND IS OF GREAT CONSEQUENCE IN ACHIEVING THE JUST AND UNIFORM IMPLEMENTATION OF OUR IMMIGRATION LAWS

The issue presented in this case is one that recurs frequently and impacts the rights of hundreds or thousands of litigants each year. Almost three hundred thousand immigrants were subject to removal proceedings in fiscal year 2006. Executive Office for Immigration Review, Office of Planning,

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[8] *See Ikenokwalu-White v. Gonzales*, 495 F.3d 919, 924 n.2 (8th Cir. 2007) (noting that "the Attorney General in the present case sent our court a letter withdrawing arguments against jurisdiction . . . and conceding this issue); *Lendo*, 493 F.3d at 441 n.1 (4th Cir. 2007) (noting that the Government withdrew its argument that § 1252(a)(2)(B)(ii) precluded judicial review of continuance denials); *Alsamhouri*, 484 F.3d at 121 ("The government now concedes . . . that section 1252(a)(2)(B)(ii) poses no jurisdictional bar to judicial review of a decision by an IJ . . . to grant or deny a continuance (internal footnotes omitted).").

Analysis, & Technology, *FY 2006 Statistical Yearbook*, at C3 (2007), *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf. Many of these immigrants request continuances during their removal proceedings, and continuances are appropriate for numerous reasons, including "to allow the alien time to obtain representation or to file an application for relief." *Id.* at B1. Many other immigrants request continuances during proceedings to adjust status.[9]

While the ultimate decision whether to grant an adjustment of status may be discretionary, 8 U.S.C. § 1255(a), an immigrant's opportunity to fully and fairly present her case is nonetheless a matter of significance. Even though a final decision denying the relief sought may not be subject to appellate review, we must assume that the decisionmakers of last resort will be influenced by, and act in good faith based upon, the facts and argument presented to them. Thus, the loss of the ability to make one's case because an IJ has arbitrarily denied a continuance is a matter of great consequence.

Continuances play an especially important role in removal cases and whenever an adjustment of status may be at issue. The process of adjustment often presents aliens with logistical challenges such as procuring the proper documentation in a timely

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[9] The Department of Homeland Security reports that 121,587 persons were admitted to permanent residence in fiscal year 2006 pursuant to employment-based preferences such as the one under which Ms. Gulati claims eligibility. Dep't of Homeland Security, Office of Immigration Statistics, *2006 Yearbook of Immigration Statistics* 18 (Table 6) (2006).

fashion, which can impede the smooth processing of their applications to adjust. A willingness to make reasonable allowances by the grant of continuances to allow good faith efforts to provide the required information thus may often be dispositive in carrying out the statute's purposes. This is especially true in the context of section 245(i), where Congress clearly expressed a view that certain individuals should be afforded a special opportunity to make their case for adjustment of status. 8 U.S.C. § 1255(i). Petitioner is eligible to invoke the grandfather status under to section 245(i) and the decision of the Seventh Circuit holding a denial of a continuance unreviewable eviscerates the significance that Congress intended to afford to that status.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.[10]

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[10] Petitioner further submits, under all the circumstances, that this may be an appropriate case for summary reversal.

In the event that, at the time the Court considers this petition, the Court has already granted certiorari in *Ali v. Mukasey*, No. 07-798, then Petitioner asks that this petition be held pending the resolution of *Ali*.

Respectfully submitted,

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Dated: January 17, 2008

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Argued June 13, 2007
Decided October 15, 2007

Before

Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 06-3221

INDU GULATI,
Petitioner,
v.
PETER D. KEISLER, Acting Attorney General of the United States,
Respondent.

ORDER

Indu Gulati—a citizen of India who overstayed her visitor's visa—moved to continue her removal proceedings to allow a potential employer more time to apply for labor certification on her behalf. She argued that the labor certification, if approved, would render her eligible for an employment-based visa and eventually to adjust her status to that of a lawful permanent resident. The immigration judge denied

the motion to continue and granted her voluntary departure; the Board of Immigration Appeals affirmed. Gulati appeals.

Background

Under § 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i), an alien who overstays her visa may nonetheless apply to adjust her status if an employer filed an application for labor certification on her behalf before April 30, 2001. *See Ahmed v. Gonzales*, 465 F.3d 806, 808 (7th Cir. 2006). If the application "was approvable when filed," meaning it was "properly filed, meritorious in fact, and nonfrivolous," then the alien is considered "grandfathered," and the approval of the labor certification application allows her to apply for adjustment of status. 8 U.S.C. § 1255(i)(2); 8 C.F.R. § 245.10(a); *Hadayat v. Gonzales*, 458 F.3d 659, 662 (7th Cir. 2006). Even if the labor certification application is denied or withdrawn, a grandfathered alien may seek to adjust her status on the basis of "any other ground . . . under the Act." 8 C.F.R. § 245.10(i). Although a grandfathered alien must be physically present in the United States to adjust her status, she has no legal right to remain here until a visa becomes available; all that is "grandfathered" is the alien's eligibility to apply for adjustment. 8 U.S.C. § 1255(i)(1); 8 C.F.R. § 245.10(l); *Hadayat*, 458 F.3d at 662-63.

Gulati—who overstayed her non-immigrant visitor visa in 1998—considers herself grandfathered under § 245(i) because some time before April 30, 2001, a California company, Sapron of Fullerton, filed a labor certification application on her behalf. Before the application was approved, however, Sapron of

Fullerton went out of business. When the Department of Homeland Security placed Gulati into removal proceedings in 2004, the IJ continued her removal hearing to give her time to submit evidence that the labor certification application was approvable when filed. At the next hearing Gulati submitted a copy of the California labor certification application but advised the IJ that the sponsoring company was no longer in business. The IJ noted that Gulati had not shown that the labor certification application was from a valid company. After conceding removability, Gulati sought another continuance so a potential employer in Illinois could file a new labor certification application on her behalf.

In his oral ruling, the IJ denied the continuance and granted Gulati voluntary departure. Although the IJ initially balked at deciding whether Gulati was grandfathered under § 245(i), he ultimately concluded that "this Court does not find on the basic facts presented that she is even 245(i) eligible." The IJ noted that Gulati had no labor certification application pending and thus determined that the possibility that a future labor certification application would lead to permanent resident status was too speculative to justify a continuance. The IJ also stated that he would deny the continuance "solely in the exercise of discretion because the respondent simply remained in the United States despite entering as a visitor and violat[ing] the immigration laws." Gulati appealed the IJ's order, and the BIA approved the IJ's rationale for denying the continuance, affirmed the order granting voluntary departure, and dismissed the appeal.

Analysis

Gulati contends that the IJ abused his discretion in denying her motion to continue the removal proceedings to allow her to file a new labor certification application. But we cannot reach the merits of her argument until we determine whether we have jurisdiction to review the IJ's discretionary denial of Gulati's motion to continue. *See Leguizamo-Medina v. Gonzales*, 493 F.3d 772, 774 (7th Cir. 2007). At the time Gulati filed her opening brief, we had only assumed, without deciding, that we generally lack jurisdiction to review an IJ's discretionary decision to deny a continuance in a removal proceeding. *See Subhan v. Ashcroft*, 383 F.3d 591, 595 (7th Cir. 2004). She urged us to retract this assumption and "to assert general subject matter jurisdiction" over an IJ's denial of a continuance. Her argument is precluded by our recent decision in *Ali v. Gonzales*, Nos. 06-3240, 06-3879, 2007 WL 2684825, at *4-*5 (7th Cir. Sept. 14, 2007).

In *Ali* we held for the first time that "the jurisdiction-stripping provision of § 242(a)(2)(B)(ii) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1252(a)(2)(B)(ii), generally precludes judicial review of continuance decisions of immigration judges." *Id.* at *1. Noting that section 242(a)(2)(B)(ii) precludes judicial review of any immigration decision "the authority for which is specified under this subchapter to be in the discretion of the Attorney General," we ruled that the authority to grant or deny a continuance is derived from part of the relevant subchapter--specifically, 8 U.S.C. § 1229a. *Id.* at *4. We further noted that a general jurisdictional bar is consistent with our reasoning in

Leguizamo-Medina, 493 F.3d at 775, where we held that we lack jurisdiction to review interim orders—such as continuance denials—which lead up to an unreviewable final decision—such as the denial of adjustment of status. *Id.*

Here, Gulati sought a continuance to file a new labor certification application that might allow her to pursue adjustment of status. As in *Ali*, Gulati's motion was leading up to her anticipated petition to adjust status, and thus is unreviewable. *See Ali*, 2007 WL 2684825, at *5. We therefore lack jurisdiction to review the IJ's denial of Gulati's motion to continue unless the decision falls within the limited jurisdictional exception carved out in *Subhan v. Ashcroft*, 383 F.3d 591, 595 (7th Cir. 2004), and *Benslimane v. Gonzales* 430 F.3d 828, 831-32 (7th Cir. 2005), and preserved in *Ali*, 20007 WL 2684825, at *6.

The petitioners in *Subhan* and *Benslimane* sought continuances to await government action on labor certification applications that—through no fault of their own—were languishing before the Department of Labor. The IJs denied the continuances, observing only that the aliens were not yet eligible for relief. We found jurisdiction to review the denials because they prevented the government from acting on the applications, effectively stripping the petitioners of their eligibility to adjust status. *Benslimane*, 430 F.3d at 832; *Subhan*, 383 F.3d at 595. We held that under those circumstances, the IJ must provide some reasoned explanation for denying the continuance that is consistent with the statute authorizing adjustments to status. *Benslimane*, 430 F.3d at 832; *Subhan*, 383 F.3d at 595. The IJ must go beyond

merely citing the government's failure to act, which is just a remark about procedural status. *Benslimane*, 430 F.3d at 832; *Subhan*, 383 F.3d 593-94.

This case parts way from *Subhan* and *Benslimane* because it does not fall within the jurisdictional exception carved out in those cases. Unlike the petitioners in *Subhan* and *Benslimane*, Gulati is not seeking additional time for the government to act on a labor certification or similar application; she concedes that her original application is no longer viable because the sponsoring employer no longer exists. And the IJ specifically found that Gulati's labor certification application was not pending when she sought a continuance. *Cf. Ali v. Gonzales*, 440 F.3d 678, 680 (5th Cir. 2006) (approving denial of continuance where, as here, the alien had no pending labor certification); *Hassan v. I.N.S.*, 110 F.3d 490, 492 (7th Cir. 1997) (noting that visa applicant is only entitled to the IJ's favorable discretion when visa petition is pending adjudication). Thus it was not government inaction that cut off Gulati's eligibility to adjust status, but her lack of a viable labor certification application.

Although Gulati assumes throughout her brief that she is grandfathered under § 245(i)—and therefore eligible to file a new labor certification application even though the first is no longer pending—the IJ said in his oral ruling that he did "not find on the basic facts presented that she is even 245(i) eligible." He said that Gulati had not shown that the California labor certification application was approvable when filed because she had not shown that the sponsoring company was a valid business. Gulati's failure to mention that finding—let alone

challenge it—either before the BIA or in her petition in this court, waives any challenge to that aspect of the IJ's ruling. *See Huang v. Gonzales*, 403 F.3d 945, 951 (7th Cir. 2005). Given the IJ's unchallenged finding that she is not eligible to file a new application for labor certification, the denial of her request for a continuance does not arbitrarily strip Gulati of a Congressionally-conferred benefit. *See* 8 U.S.C. § 1255(i); 8 C.F.R. § 245.10(a)(3). Thus the denial does not fall within *Subhan*'s exception to the general bar against jurisdiction.

Gulati raises one argument that does not fall within *Ali*'s jurisdictional bar; she argues that the IJ violated her constitutional right to due process by prejudging her eligibility to adjust status. Specifically, she challenges the propriety of the IJ's statement that "this court would not grant permanent resident status in the future in the exercise of discretion, solely based upon [Gulati]'s delaying her departure from the United States by filing a frivolous appeal." Gulati neglects to mention that the BIA specifically disapproved of the IJ's statements, but found the error harmless because Gulati's eligibility to adjust status "in the future" was not an issue presently before the IJ. Gulati does not explain why the error was anything other than harmless, and accordingly, her due process claim is meritless. *See Szczesny v. Ashcroft*, 358 F.3d 464, 465 (7th Cir. 2004).

Accordingly, we DISMISS the petition with respect to Gulati's challenge to the denial of her motion for a continuance and DENY the petition with respect to Gulati's constitutional challenge.

U.S. Department of Justice
Executive Office of Immigration Review
Decision of Board of Immigration Appeals
Falls Church, Virginia 22041

File: A97-331-330 – Chicago
Date: JUL 21 2006

In re: GULATI, INDU

IN REMOVAL PROCEEDINGS

APPEAL

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge except as noted herein. *See* Matter of Burbano, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those the Immigration Judge articulated in his or her decision"). We find no abuse of discretion in the Immigration Judge's decision to deny a continuance in this matter. The Immigration Judge gave two reasons for denying the continuance. First, the respondent was not waiting for the adjudication of a labor certification application, since an application had not even been filed, and it was speculative that such an application

would be approved and that a visa petition based upon the labor certification would then also be approved. It was also speculative that the respondent's son, who had recently married a United States citizen, would be in a position to petition for the respondent. Second, the respondent had been in the United States in an unlawful status for 3 years before her first labor certification application had been filed. The employer in that instance discontinued operations and yet the respondent still remained in the country. The Immigration Judge stated he would not continue proceedings for an alien who flagrantly violated the immigration laws of the United States. We find these to be valid reasons for denying a continuance. *See Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004). As a final matter, we specifically disapprove of the Immigration Judge's prejudgment of an issue not before him. *See* I.J. at 5 (opining how the respondent's case would be handled if she appealed his decision to the Board and then appeared before him in future to seek adjustment of status). However, this was harmless error. Accordingly, the appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security (DHS). *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.26(c), (f). In the event the alien fails to so depart, the alien shall be

removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the DHS, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW - IMMIGRATION COURT
Chicago, Illinois

File No.: A 97 331 330 June 16, 2005

IN REMOVAL PROCEEDINGS

In the Matter of:
INDU GULATI, Respondent

CHARGE: INA Act – Section 237(a)(1)(B) – non-imigrant remained longer than permitted.

APPLICATION: Continuance of proceedings.

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 48 year old widowed female alien, a native and citizen of India. The respondent last entered the United States as a non-immigrant visitor on December 8, 1997 and was authorized to remain in the United States only for a temporary period not to exceed May 7, 1998. The respondent, however, did not depart and simply remained in the United States, in violation of law. On August 24, 2004, she was placed under removal proceedings with a Notice to Appear being issued by the Department of Homeland Security. The notice charges the respondent with removability for remaining in the

United States for a longer time than permitted under Section 237(a)(1)(B) of the Act.

Respondent appeared at a removal hearing held on October 27, 2004 with counsel and requested time to confer with her attorney concerning the issue of voluntary departure and relief. Respondent's case was continued to February 1st, 2005. Respondent's case was then rescheduled for May 24, 2005 and then later June 3rd, 2005. Ultimately, a final hearing was held on June 16, 2005 at which time, the respondent, through her attorney, admitted the factual allegations contained in the Notice to Appear and conceded removability. Based upon these admissions, I find removability has been established by evidence which is clear, convincing, and unequivocal.

In lieu of removal, the respondent indicated that her son has married a United States citizen and is in the process of obtaining permanent resident status. The respondent believes that if her son becomes a permanent resident of the United States, and then a citizen of this country, she will be eligible to obtain permanent resident status in the future. The respondent, through her attorney, also offered an application for a employment based labor certification, which was filed on her behalf by a company in California on or about April 30, 2001. While this application is no longer viable and there is no job offer in existence for the respondent, her attorney argued that the labor certification was properly filed, that the respondent would have 245(i) eligibility in the future should she become eligible for permanent resident status. Counsel for the respondent also indicated that while no labor

certification is presently pending, the respondent hopes to be sponsored under the new regulations for labor certification by her present employer. Thus, the respondent argues that some time in the future, she may be eligible to apply for permanent resident status through employment under Section 245(i) of the Act.

In reaching a decision in this case, it's clear that the respondent does not wish to leave her son and depart the United States. However, I see no relief available to the respondent and will only grant her voluntary departure. The respondent is not eligible for permanent resident status and has failed to establish statutory eligibility for that relief. If the respondent's son becomes a permanent resident of the United States, she still would not be eligible to remain in this country. It's far to speculative to conclude that the respondent will be eligible for permanent resident status through her son in the near future. Moreover, this Court does not continue cases on aliens who have flagrantly violated the immigration laws of the United States. I would deny any request for a continuance in the exercise of discretion, because the respondent simply remained in the United States longer than permitted and still does not wish to depart. The record reflects that despite entering as a temporary visitor for a period of five months, the respondent simply remained here for an additional six years and even when placed under removal proceedings, hesitated in even agreeing to leave voluntarily.

Alternatively, the respondent's attorney argues that if a new labor certification is filed and approved, the respondent would then be able to file an

employment based I-140 petition with the U.S. CIS, which would perhaps lead to permanent resident status for the respondent. Again, I find this far too speculative to continue the respondent's case. Even if a labor certification is filed by her present employer, this does not support a favorable exercise of discretion or prima facie eligibility for relief. The Board of Immigration Appeals decision in Matter of Valardo (citation omitted) and Matter of Garcia (citation omitted) only indicate that if a visa petition is pending with the Department of Homeland Security U.S. CIS, which is prima facie approvable and respondent merits a continuance, can the Immigration Court grant such a request. Here, this Court does not find on the basic facts presented that she is even 245(i) eligible. Even if the respondent is 245(i) eligible, no labor certification has been filed on her behalf and no evidence has been presented to show that it is prima facie approvable. Moreover, I would deny a continuance of this case solely in the exercise of discretion because the respondent simply remained in the United States despite entering as a visitor and violated the immigration laws. This Court recognizes that the respondent hopes to return to the United States in the future as a permanent resident, this Court sees no reason to exercise discretion favorably for the respondent at the present time.

Finally, this Court would note that if the respondent chooses to file an appeal from the grant of voluntary departure, it would be filed solely for purposes of delay. Respondent is eligible for no other relief other than voluntary departure, at the present time. While this Court recognizes the respondent would like to stay in this country as long as she can,

filing an appeal to the Board of Immigration Appeals for purposes of delay is an additional negative factor in her case. Therefore, this Court would not grant permanent resident status in the future in the exercise of discretion, solely based upon respondent's delaying her departure from the United States by filing a frivolous appeal.

Accordingly, the following order will be entered.

ORDERS

IT IS ORDERED the respondent's request for a continuance be denied.

IT IS FURTHER ORDERED that the respondent be granted a voluntary departure if she departs the United States on or before August 16, 2005.

IT IS FURTHER ORDERED that the respondent post a $500 departure bond with the Department of Homeland Security within five days of this decision to qualify for voluntary departure.

IT IS FURTHER ORDERED: that if the respondent fails to depart when and as required or fails to post a voluntary departure bond within the time set, then this privilege of voluntary departure shall be withdrawn without further notice or proceeding and the following order shall thereupon become immediately: the respondent shall be deported, removed from the United States to India on the charge contained in the Notice to Appear.

Robert D. Vinikoor
Immigration Judge

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW - IMMIGRATION COURT
Chicago, Illinois

File No.: A 97 331 330 June 16, 2005

IN REMOVAL PROCEEDINGS
TRANSCRIPT OF HEARING

In the Matter of:
INDU GULATI, Respondent

Before ROBERT D. VINIKOOR, Immigration Judge

Date: June 16, 2005
Place: Chicago, Illinois

JUDGE FOR THE RECORD

For the record, this is a continued removal proceeding being held June 16, 2005 before Immigration Judge Robert D. Vinikoor at the Immigration Court sitting at Chicago. This hearing relates to Indu Gulati, file A 97 331 330. This respondent is in court with her attorney.

JUDGE TO MS. ANCEOLA

Q. Counsel, would you identify yourself, again, for the record?

A. Mary Lucia Anceola, for respondent.

JUDGE FOR THE RECORD

And also her son.

JUDGE TO MR. GULATI

Q. Would you state your name, sir?

A. (indiscernible) Gulati.

JUDGE TO MS. GULATI

Q. And your name, ma'am?

A. Indu Gulati.

JUDGE TO MS. HOLLANDER

Q. And, Ms. Hollander?

A. Lynn Hollander on behalf of the Government.

JUDGE TO MS. ANCEOLA

Q. Ms. Anceola, I don't think we took a pleading on the allegations in the Notice to Appear. My notes don't show whether we did or not.

A. Okay.

Q. The respondent charged with being a native and citizen (indiscernible) entering as a visitor in 1997 and remaining longer than permitted.

A. Yes –

JUDGE TO MS. GULATI

Q. Did you enter in 1997, ma'am, as a visitor?

A. Yes, sir.

Q. And you were authorized to remain here for about six months?

A. Yes.

Q. Did you ever get an extension beyond that six months?

A. No.

Q. Okay. And you're a native and citizen of India?

A. Yes.

JUDGE TO MS. ANCEOLA

Q. So, you're admitting those allegations, counsel?

A. Yes, we are, Your Honor.

Q. And conceding removability?

A. Yes, we are, Your Honor.

Q. And designated India for removal, if necessary?

A. Yes, we are, Your Honor.

Q. Okay.

JUDGE FOR THE RECORD

Now, we had an off the record discussion. The respondent's son is applying for permanent residency, and he's married to a citizen. If he's a permanent resident, becomes a citizen of the United States, he can sponsor his mother for permanent resident status. That's down the road. She's gonna have to apply for a visa at the American embassy in India and return with a permanent residency visa. I don't see anything else the respondent is eligible for other than voluntary departure.

Now, you have tendered to me what appeared to be an application for a labor certification with a priority date of April 30, 2001 from some company in California. Is that correct?

A. That's correct, Your Honor.

JUDGE FOR THE RECORD

I'll mark this in the record. I think you previously filed a motion for continuance. And in fact, there

have been a couple of motions. Let's see what I have in the file here. Apparently, you moved for a continuance from the March hearing. So, I'm going to mark that material in the record as Exhibit –

MS. ANCEOLA TO JUDGE

Q. I'm not sure we moved for a continuance from March. I believe that was continued by the Court, Your Honor. We were last here –

A. Oh, I see. We moved up.

Q. – in September. It was moved up. It was – oh, I'm sorry. It was moved up by the Court to a date that I was not available –

A. Okay. So, that's fine. I'm just marking that material in the record –

Q. – and then unfortunately there was another situation.

A. – and I'll mark the June 2nd request for a continuance because you were out of the country as Exhibit 3.

JUDGE FOR THE RECORD

And I'll mark this labor certification material as Exhibit 4.

JUDGE TO MS. ANCEOLA

Q. You advised me that this is no longer a job offer, that this company is out of business. But the sole purpose of you submitting this to show that the respondent did have an April 30th, 2001 priority date.

A. Huh huh.

Q. So, if in fact, she becomes eligible for permanent residence, she might be grandfathered in under 245(i)?

A. Correct, Your Honor.

Q. Okay. Well, I don't see that she's eligible for permanent residence. Her son is not a citizen of the United States. And respondent is not going to be able to remain in the United States for four or five years to hopefully wait for 245 eligibility in the future. This is not a case based upon an approved labor certification. So, simply because the respondent down the road would like to become a permanent resident doesn't mean she can just stay in the United States. Now, I've explained this to the son at the prior hearing, where you were not here.

You've indicated to me, off the record, that you would like to request another continuance today?

A. Well, we also are in the process of doing another labor cert for her current job offer, here in Illinois. That we're doing that under perm (phonetic sp.), right now. That is not yet approved. It's not yet filed, and it's not yet approved. But it's in the final stages of being prepared for, to be filed under perm, which does have a much faster approval, albeit with a different priority date. But she does have the 245(i) eligibility.

Q. Well –

A. And that's really what we're basing it on.

Q. -- I'm not deciding whether she has 245(i) eligibility or not. You would have to show that this is an approvable filing. And I don't know if this is a valid company connection to the respondent, thousands of people went out and filed applications

on April 30th, 2001 to be grandfathered in without any real plans to accept those job offers. So, at this time, I'm not even deciding the 245(i) eligibility issue.

A. Okay.

Q. But I'm not going to grant a continuance based upon speculation. I've already granted a few continuances in this case. Respondent was placed under proceedings in August of 2004 and it's already nine or 10 months, 10 months, since this case began. So, what I'll do is I'll dictate a decision granting the respondent voluntary departure and then you can file an appeal, if you think this case should have been continued.

MS. HOLLANDER TO JUDGE

Q. Your Honor, by the Government –

A. Yes.

Q. -- may the respondent be qualified for being (indiscernible) –

A. Okay.

JUDGE TO MS. GULATI

Q. Ma'am, have you been convicted of any crimes in the United States, since you came here?

A. No. No.

Q. Do you have money to pay for your transportation to India, if you have to leave? You have to be able to pay for your own ticket.

A. Yes.

Q. If you lose your appeal, are you willing to leave the United States voluntarily, or do you have to be deported by the Government? Are you willing to leave voluntarily?

MR. GULATI TO JUDGE

Q. Voluntarily.

MS. HOLLANDER TO MR. GULATI

Q. Sir, please don't speak.

A. (Indiscernible.)

JUDGE TO MS. HOLLANDER

Q. That's fine. It's clear, Ms. Hollander, that respondent really doesn't want to leave the United States. I would not be inclined to reopen this case for adjustment of status anyway if the respondent appealed. In effect, respondent is just stalling for time, by filing what I would consider a frivolous appeal for purposes of delay. Then I would not exercise discretion favorably should the respondent become eligible in the future for permanent residence solely by her filing a dilatory appeal. The respondent can file that appeal because the Board takes between six months and a year to dismiss appeals. That would get the respondent some additional time for voluntary departure. But I'm certainly not going to exercise discretion favorably should the respondent remain in the United States and become eligible for permanent residence, in the future.

JUDGE RENDERS ORAL DECISION

JUDGE TO MS. GULATI

Q. Ma'am, I've granted you 60 days to leave voluntarily until August 16, 2005. If you fail to leave during the voluntary departure period, then this order of voluntary departure expires, and an order of deportation and removal goes into effect and then you'll be notified to report for your deportation by

Immigration, and they will make the arrangements for you to return you to India. If you leave the United States under an order of deportation, that has a 10 year bar to coming back to the United States on any other type of visa. So, it's to your advantage to leave during the voluntary departure period.

Now, you have the right to appeal my decision to the Board of Immigration Appeals in Falls Church, Virginia if you think my decision is wrong or unfair. So, you would have 30 days to file an appeal from my decision, and the appeal would have to be filed with the higher court by July 18th. If you file that appeal by July 18, then my decision is not final until it is reviewed. The departure order I've entered doesn't go into effect. If your appeal is dismissed after six months or nine months, the higher court will normally give you an additional 30 days to leave voluntarily. If you don't leave during that 30 day voluntary departure period, then the order of deportation goes into effect. So, if you file that appeal, then you would not have to leave within the 60 days. But if your appeal is dismissed, then you would have to leave when your appeal was dismissed.

Do you understand your right to appeal?

A. Yes.

Q. Okay.

JUDGE TO MR. GULATI

Q. Do you understand that, sir? Do you understand your mother can appeal my decision.

A. Yes.

Q. Okay.

JUDGE TO MS. ANCEOLA

Q. Counsel, do you waive the formal reading of the 240 consequences?

A. Yes, we do, Your Honor.

JUDGE TO MS. GULATI

Q. Ma'am, under the law, if you don't leave during the voluntary departure period, either my period or a later period set by the Board of Immigration Appeals, you cannot reopen this case in the future to apply for permanent resident status, cancellation of removal, or anything else for 10 years.

So, it's important to leave during the voluntary departure period.

JUDGE TO MS. HOLLANDER

Q. Ms. Hollander, do you want to reserve appeal, as well?

A. No, I'd like to waive.

JUDGE FOR THE RECORD

This hearing stands closed.

HEARING CLOSED

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

December 27, 2007

Before

Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. ANN C. WILLIAMS, *Circuit Judge*

No. 06-3221

INDU GULATI, *Petitioner-Appellant,*	Petition for Review of an Order of the Board of Immigration Appeals
v.	
MICHAEL B. MUKASEY, Attorney General of the the United States, *Respondent-Appellee.*	No. A97-331-330

ORDER

A Petition for Rehearing with suggestion for Rehearing En Banc was filed by Petitioner-Appellant on November 21, 2007. All of the judges on the

original panel having voted to deny the petition for Rehearing, and no judge in active service having called for a vote on the Petition for Rehearing En Banc.

IT IS HEREBY ORDERED that the Petition for Rehearing with Suggestion for Rehearing En Banc is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

October 2, 2006

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

INDU GULATI,	]	Petition for Review of
Petitioner,	]	an Order of the Board of
	]	Immigration Appeals
v.	]	No. 06-3221
	]	No. A97-331-330
ALBERTO R. GONZALES,	]	
Respondent.	]	
	]	

The following are before the court:

1. MOTION FOR STAY OF VOLUNTARY DEPARTURE, filed on September 5, 2006, by counsel for the Petitioner.
2. RESPONDENT'S NON-OPPOSITION TO PETITIONER'S REQUEST FOR A STAY

OF VOLUNTARY DEPARTURE, filed on September 19, 2006, by counsel for the Respondent.

IT IS ORDERED that #1 is GRANTED. The Petitioner's period of voluntary departure is STAYED pending resolution of all matters in this court.

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

Syed IQBAL ALI,
Petitioner,

v.

Alberto R. GONZALES,
Respondent.
Nos. 06-3240, 06-3879.

Argued Feb. 22, 2007.
Decided Sept. 14, 2007.

Before BAUER, EVANS, and SYKES, Circuit Judges.

SYKES, Circuit Judge.

Syed Ali petitions for review of decisions of the Board of Immigration Appeals ("BIA") affirming an immigration judge's ("IJ") denial of his request for a continuance and denying his subsequent motion for reconsideration. Ali sought to continue his removal hearing to await a disposition on his son Zeeshan's application for American citizenship; once naturalized, Zeeshan could sponsor Ali's petition to adjust his status to that of a lawful permanent resident. Ali now argues, as he did before the BIA, that the IJ failed to provide an adequate reason for denying the continuance. He also contends that the

National Security Entry-Exit Registration System ("NSEERS") program, through which his illegal presence in the United States was brought to the attention of the immigration authorities in the first place, unconstitutionally targets aliens from Arab and Muslim countries.

This circuit has previously assumed, without deciding, that the jurisdiction-stripping provision of § 242(a)(2)(B)(ii) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1252(a)(2)(B)(ii), generally precludes judicial review of continuance decisions of immigration judges. *Subhan v. Ashcroft,* 383 F.3d 591, 595 (7th Cir. 2004). The Attorney General now argues, in a change of position, that § 1252(a)(2)(B)(ii) does *not* apply to denials of continuances. We note the concession but disagree.

Section 1252(a)(2)(B)(ii) provides (with an exception not relevant here) that "no court shall have jurisdiction to review ... any other decision or action of the Attorney General ... the *authority* for which is *specified under this subchapter* to be in the discretion of the Attorney General." 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added). The Attorney General's current view is that this provision is inapplicable to continuance decisions because an immigration judge's authority to grant continuances is conferred by regulation, not statute. While it is true that continuances are specifically mentioned only in the administrative regulations, *see* 8 C.F.R. § 1003.29, an immigration judge's *authority* to grant or deny a continuance is statutory; it derives from 8 U.S.C. § 1229a, which confers upon immigration judges the plenary authority to conduct removal proceedings. The regulation regarding continuances simply

implements the immigration judge's statutory authority to control the course of removal proceedings.

Accordingly, as suggested but not decided in *Subhan,* an immigration judge's denial of a continuance motion is a discretionary "decision or action" the "authority for which" is committed to the immigration judge by the relevant subchapter of the INA, and the jurisdictional bar in § 1252(a)(2)(B)(ii) generally precludes judicial review. Although this is the minority position among the circuits that have considered the question, we think it the sound one and now adopt it.[1] This position is consistent with our recent decision in *Leguizamo-Medina v. Gonzales,* 493 F.3d 772, 775 (7th Cir. 2007), which interpreted the preceding subsection of the jurisdiction-stripping statute, § 1252(a)(2)(B)(i). *Leguizamo-Medina* held that where § 1252(a)(2)(B)(i) removes jurisdiction to review a final immigration decision (the statute eliminates judicial review of agency decisions regarding certain forms of immigration relief), review of continuance denials and other interim orders leading up to the final decision is also precluded.

Here, Ali conceded removability but sought a continuance so he could pursue adjustment of status if his son's application for citizenship was approved. He now seeks review of the denial of the continuance,

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[1] This opinion has been circulated among all judges of this court in regular active service pursuant to Circuit Rule 40(e). A majority did not favor rehearing en banc on the question of whether the jurisdiction-stripping provision, 8 U.S.C. § 1252(a)(2)(B)(ii), applies to continuance decisions of immigration judges. Judges Ripple, Rovner, Wood, and Williams voted to rehear this case en banc.

but our review is barred by both § 1252(a)(2)(B)(ii) and the logic of *Leguizamo-Medina.* Adjustment of status determinations are unreviewable under § 1252(a)(2)(B)(i); the IJ's continuance decision is interim to Ali's contemplated adjustment of status application, and interim orders entered along the road to an unreviewable final order are themselves unreviewable.

We also hold that Ali's case does not fall within the exception to the jurisdictional bar recognized in *Subhan.* Finally, we lack jurisdiction to consider Ali's constitutional challenge to the NSEERS program.

I. Background

Ali, a citizen of Pakistan, entered the United States in 1996 on a six-month visitor's visa. He overstayed his visa and in 2003 was placed in removal proceedings. After a preliminary hearing in April 2003, his case was continued, and at the next hearing in November, Ali conceded removability. Through counsel, he told the IJ that his son Zeeshan had a pending application for citizenship and that once he was naturalized, Zeeshan intended to file a family-based visa petition (I-130) on Ali's behalf. Ali also informed the IJ that although he missed the one-year deadline for seeking asylum, he intended to apply for withholding of removal and relief under the Convention Against Torture. (He apparently never did apply for these forms of relief.) The IJ continued the hearing twice more, until February 2005.

Meanwhile, Zeeshan—who had not yet been granted citizenship—filed an I-130 petition on Ali's behalf. Zeeshan, a permanent resident, represented that he was sponsoring Ali as a "parent of U.S. citizen." Ali moved to have his removal case

continued again, or administratively closed, to await a decision on Zeeshan's citizenship application. The government opposed the motion.

At the February 2005 hearing, Ali argued that his son's naturalization application was still pending and that it would be unjust to "tear a father from his son" if Ali could adjust his status once Zeeshan became a citizen. To support his request for a continuance, Ali offered into evidence a "walk-in form" that Zeeshan had submitted to the office of United States Senator Richard Durbin requesting intervention in his citizenship application. On that form Zeeshan stated his interview and citizenship test had been held in January 2004, and his application for citizenship had been denied on the ground of "poor moral character."

Without mentioning this form-evidence submitted by Ali establishing that Zeeshan's naturalization application had already been *denied*-the IJ concluded that Ali had not established the requisite "good cause" for a continuance. 8 C.F.R. § 1003.29. The IJ explained that Ali was not immediately eligible for a visa, that a long continuance had already been granted based on Ali's representation that his son's application would be decided soon, and that "everyone who appears before me has family ties in the United States." The IJ denied the continuance and granted relief in the form of voluntary departure.

Ali appealed the IJ's decision to the BIA, arguing that the denial of a continuance was erroneous under *In re Velarde-Pacheco,* 23 I. & N. Dec. 253 (BIA 2002), and *Subhan,* 383 F.3d at 593-94. In *Velarde-Pacheco,* the BIA determined that a properly filed motion to reopen for adjustment of status based on a marriage-based visa petition may be granted in the

exercise of discretion as long as certain criteria are met. 23 I. & N. Dec. at 256. In *Subhan,* this court held that an IJ had erred by arbitrarily denying a continuance to an alien seeking to adjust his status based on an employment certification, the application for which was awaiting action by the state and federal labor departments. 383 F.3d at 595. The BIA rejected Ali's argument that his case was analogous to either *Subhan* or *Velarde-Pacheco* and concluded that the IJ had given adequate reasons for denying the continuance. In addition, the BIA held that the continuance was properly denied based on the evidence Ali submitted indicating that Zeeshan's citizenship application had already been denied due to poor moral character.

Ali moved for reconsideration. The BIA denied the motion because Ali merely reiterated the arguments he made on appeal rather than citing any legal or factual omission or defect in the BIA's decision.[2] Ali now petitions for review.

II. Discussion

Ali contends the IJ improperly denied a continuance simply because no visa was immediately available for him, a flaw in reasoning that led to our granting the petition for review in *Subhan,* which he argues is indistinguishable from his case. He also faults the BIA for relying on the apparent denial of his son's citizenship application, which he asserts is still pending and which was not (he now claims) the only basis for adjusting his status. Ali asserts that

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[2] Although we are dismissing the petitions for review for lack of jurisdiction, we note that the BIA's reason for denying reconsideration is consistent with *Rehman v. Gonzales,* 441 F.3d 506, 508 (7th Cir. 2006).

Zeeshan's permanent resident status provides an alternate ground to adjust status. Finally, Ali challenges the constitutionality of the NSEERS program that brought him to the attention of the Department of Homeland Security ("DHS") and led to the commencement of removal proceedings against him.

Before reaching the merits of Ali's arguments, we must first consider our jurisdiction to review a denial of a continuance in a removal proceeding. In *Subhan,* we assumed jurisdiction to review continuance decisions was lacking by virtue of the jurisdiction-stripping provision of § 1252(a)(2)(B)(ii). But we sidestepped an ultimate decision on the question, reasoning that if the denial of a continuance effectively nullified the statutory opportunity to adjust status, *see* 8 U.S.C. § 1255, the IJ must provide a reason for the denial consistent with § 1255, not just a statement of the procedural posture of the case. 383 F.3d at 593-94. The IJ in *Subhan* had denied a continuance simply because the alien's labor certification had not yet been processed, which we viewed as "merely a statement of the obvious," not a *reason. Id.* at 593.

While the Attorney General has argued in other cases that we lack jurisdiction to review continuance denials (and also has sought to distinguish or limit *Subhan),* in this case and others more recently, he "declined to assert" the jurisdictional bar. We have noted the impropriety of this position; "jurisdiction always comes ahead of the merits." *Leguizamo-Medina,* 493 F.3d at 774. When questioned about jurisdiction at oral argument, the agency's attorney informed us that the Department of Justice now

takes the position that the jurisdiction-stripping provision, § 1252(a)(2)(B)(ii), does not apply to continuance decisions. We asked for supplemental briefing on the matter. We have carefully considered the Department's changed position and find ourselves unable to agree with it.

The jurisdiction-stripping provision at issue here precludes judicial review of immigration decisions "the *authority* for which is *specified under this subchapter* to be in the discretion of the Attorney General." 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added). By its terms, this statute removes jurisdiction to review only those decisions the authority for which is committed to the discretion of the Attorney General by 8 U.S.C. §§ 1151-1381 (the statutes comprising subchapter II of Chapter 12 of the INA). The Attorney General now argues that because continuances are referenced only in the immigration regulations, not the statutes, the discretionary authority to grant or deny a continuance is not "specified under this subchapter" within the meaning of § 1252(a)(2)(B)(ii), and the jurisdictional bar therefore does not apply.

It is true that the relevant subchapter of the INA is silent on the subject of continuances. As we noted in *Subhan,* 383 F.3d at 595, continuances are mentioned in the implementing administrative regulations, at 8 C.F.R. §§ 1003.29; this regulation provides that an immigration judge "may grant a motion for continuance for good cause shown." But an immigration judge's *authority* to grant or deny a continuance derives not from the regulation but from a statute, 8 U.S.C. § 1229a, and this statute *is* part of the relevant subchapter of the INA. Section

1229a(a)(1) confers on immigration judges the plenary authority to conduct removal proceedings; § 1229a(b)(1) describes that authority in general terms (it provides, for example, that the immigration judge has the authority to "administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses" and "issue subpoenas"). The regulation pertaining to continuances implements these statutes, but the immigration judge's *authority* to conduct and control the course of removal proceedings is "specified in" subchapter II of the INA, and this necessarily encompasses the discretion to continue the proceedings, whether on the motion of a party or sua sponte. The jurisdictional bar therefore applies to continuance decisions.

We suggested this interpretation in *Subhan* but did not affirmatively adopt it. 383 F.3d at 595 (noting that § 1229a authorizes immigration judges to conduct removal proceedings and observing that "since orders denying motions for continuances, like other orders governing the management of trials, are traditionally and indeed inevitably discretionary in character[,] ... it is apparent that section 1252(a)(2)(B)(ii) withdraws from the courts the power to review such rulings when made by an immigration judge"). We now do so. There is a circuit split on this question, and we recognize that we are aligning ourselves with the minority view. The Eighth and Tenth Circuits have adopted the same interpretation as we do here. *See Yerkovich v. Ashcroft,* 381 F.3d 990, 993-95 (10th Cir. 2004); *Onyinkwa v. Ashcroft,* 376 F.3d 797, 799 (8th Cir. 2004). The First, Second, Third, Fifth, Sixth, and Eleventh Circuits have accepted the interpretation now asserted by the

Attorney General. *See Alsamhouri v. Gonzales,* 484 F.3d 117, 122 (1st Cir. 2007); *Zafar v. Att'y Gen.,* 461 F.3d 1357, 1360-62 (11th Cir.2006); *Khan v. Att'y Gen.,* 448 F.3d 226, 232-33 (3d Cir. 2006); *Ahmed v. Gonzales,* 447 F.3d 433, 436-37 (5th Cir. 2006); *Sanusi v. Gonzales,* 445 F.3d 193, 198-99 (2d Cir. 2006); *Abu-Khaliel v. Gonzales,* 436 F.3d 627, 633-34 (6th Cir. 2006). The majority position, however, cannot be reconciled with our recent opinion in *Leguizamo-Medina.*

The alien in *Leguizamo-Medina* had sought a continuance in order to present more testimony on her claim for cancellation of removal. Her motion was denied and she petitioned for judicial review. The jurisdictional bar at issue in *Leguizamo-Medina* was § 1252(a)(2)(B)(i), the subsection preceding the statute at issue here. Section 1252(a)(2)(B)(i) eliminates judicial review of "any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title." The listed statutes pertain to the Attorney General's authority to make decisions regarding waiver of inadmissibility, cancellation of removal, voluntary departure, and adjustment of status. Because § 1252(a)(2)(B)(i)"puts the [cancellation of removal] decision beyond review," we held that the statute also "insulates the choices leading up to that decision," including the continuance decision. *Leguizamo-Medina,* 493 F.3d at 775. "When a decision is unreviewable, any opinion one way or the other on the propriety of the steps that led to that decision would be an advisory opinion." *Id.* (citing *Powerex Corp. v. Reliant Energy Servs., Inc.,* --- U.S. ----, 127 S.Ct. 2411, 2419, 168 L.Ed.2d 112 (2007); *Daniels v.*

Liberty Mut. Ins. Co., 484 F.3d 884, 887-88 (7th Cir. 2007)).

Here, Ali sought a continuance in order to pursue adjustment of status if his son naturalized. Of course we are not reviewing a final decision denying adjustment of status (the case never got that far), but Ali's continuance motion was ancillary to his contemplated petition to adjust status-that is, it was a procedural step along the way to an unreviewable final decision-and the denial of the motion is therefore unreviewable. [3]

This leaves us to consider whether Ali's case falls within the exception noted in *Subhan.* It does not. The BIA affirmed the IJ's denial of a continuance based on evidence in the record indicating that Zeeshan's citizenship application had already been denied; this is a reason consistent with the adjustment statute, not merely a "statement of the obvious." The "walk-in" form Zeeshan submitted to Senator Durbin's office stated that he had been denied citizenship "on poor moral character." The

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[3] Final orders of removal such as the one before us are generally reviewable pursuant to 8 U.S.C. § 1252(a)(1), but this general review authority is subject to the jurisdiction-stripping provisions in subsection (a)(2) of that statute, two of which we have been discussing here. The prefatory language in § 1252(a)(2)(B) states, in pertinent part: "Notwithstanding any other provision of law (statutory or nonstatutory) ... and *regardless of whether the judgment, decision, or action is made in removal proceedings,* no court shall have jurisdiction to review ...." (emphasis added). Subsections (i) and (ii), under consideration here, immediately follow this language. We note also that Ali conceded removability; his petition for review challenges only the denial of his continuance motion and the constitutionality of the NSEERS program.

BIA was entitled to rely on this evidence-which was introduced, after all, by Ali himself.

Ali protests, however, that Zeeshan's citizenship application remains viable, despite the contrary written evidence he submitted to the IJ. At oral argument, Ali's counsel confirmed that Zeeshan's first application indeed was denied on moral character grounds.[4] Counsel represented, however, that Zeeshan was able to reapply within five years and has done so. At the time of oral argument, no action had been taken on the second application. Ali's counsel also told us that all three of Ali's sons have pending citizenship applications. And after oral argument Ali's attorney sent us a copy of a Notice of Action on the citizenship application for Haris Ali, one of Ali's sons, scheduling an appointment for March 23, 2007. This form was unaccompanied by any explanation as to its significance for the case before us, although we assume that Ali would like to try to adjust his status based on Haris's citizenship if it is granted.

These developments are beside the point, however. At the time the BIA reviewed the denial of the continuance, the only record evidence concerning Zeeshan's citizenship application indicated that it was denied. To the best of the BIA's knowledge, it would have been futile to grant a continuance. *See Pede v. Gonzales,* 442 F.3d 570, 571 (7th Cir. 2006)

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[4] The Attorney General, however, represented that Zeeshan's application was dismissed for lack of prosecution after he failed to file documents pertaining to his criminal history (which, according the Attorney General, includes more than one criminal charge). Also, Zeeshan failed to prosecute the administrative appeal of the denial of his citizenship application, and the appeal was dismissed.

(holding that "ultimate hopelessness" of application for adjustment of status is "perfectly acceptable basis" for denying continuance). Because the denial of a continuance did not have the effect of nullifying the statutory opportunity to adjust status, the *Subhan* exception to the jurisdictional bar does not apply.[5]

Finally, Ali raises a constitutional challenge to the NSEERS program that caused him to come to the attention of the DHS. Ali contends that he was unconstitutionally targeted for registration and removal based on his religion and ethnicity. But we have held that under 8 U.S.C. § 1252(g), we lack jurisdiction to review a challenge to the constitutionality of the NSEERS program. *See Hadayat v. Gonzales,* 458 F.3d 659, 665 (7th Cir. 2006). Section 1252(g) bars federal courts from hearing claims "by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings." Accordingly, selective prosecution claims by aliens are largely barred. *See Reno v. Am.-Arab Anti-Discrimination Comm.,* 525 U.S. 471, 491, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999); *Hadayat,* 458 F.3d at 665; *Ahmed,* 447 F.3d at 439-40. Although a narrow exception remains for certain "outrageous" cases, *see Am.-Arab Anti-Discrimination Comm.,* 525 U.S. at 491, 119 S.Ct. 936, Ali's bare allegations of discrimination are insufficient to invoke that exception. *See Hadayat,* 458 F.3d at 665.

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[5] Insofar as Ali contends that he could also adjust his status because Zeeshan (and apparently his other sons) had a green card, he is simply incorrect. A legal permanent resident may sponsor a spouse or an unmarried child but not a parent. *See* 8 U.S.C. § 1153(a)(2).

For the foregoing reasons, Ali's petitions for review are DISMISSED for lack of jurisdiction.

IN THE SUPREME COURT OF THE UNITED STATES

No. 07A576

INDU GULATI, APPLICANT

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON APPLICATION FOR A STAY OF VOLUNTARY DEPARTURE

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The Solicitor General, on behalf of the Attorney General, respectfully submits this memorandum in opposition to the application for a stay of voluntary departure.

STATEMENT

1. a. In 1996, Congress amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to expedite the removal of criminal and other illegal aliens from the United States. *See* Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (1996). As relevant here, Congress amended the INA to limit judicial review of certain discretionary decisions of the Attorney General, providing that no court shall have jurisdiction to review any

> decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. 1252(a)(2)(B)(ii) (Supp. V 2005). The phrase "this subchapter" refers to Title 8 of the United States Code, Chapter 12, subchapter II, which is codified at 8 U.S.C. 1151 through 1381 and pertains broadly to immigration matters. *Van Dinh v. Reno*, 197 F.3d 427, 433 (10th Cir. 1999).

b. The Attorney General has promulgated regulations that provide rules of procedure for administrative removal proceedings, in order to "assist in the expeditious, fair, and proper resolution of matters coming before Immigration Judges." 8 C.F.R. 1003.12. Under those rules of procedure, if an alien seeks a continuance of proceedings, "[t]he Immigration Judge may grant a motion for continuance for good cause shown." 8 C.F.R. 1003.29; *see* 8 C.F.R. 1240.6 ("After the commencement of the hearing, the immigration judge may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Service.").

"The grant of a continuance is within the IJs' broad discretion." *Zafar v. United States Att'y Gen.*, 461 F.3d 1357, 1361 (11th Cir. 2005). To obtain reversal by the Board of Immigration Appeals (BIA or Board) of the denial of a continuance by an immigration judge (IJ), an alien must show "that the denial caused him actual prejudice and harm and materially

affected the outcome of his case." *In re Villarreal-Zuniga*, 23 I. & N. Dec. 886, 891 (B.I.A. 2006) (internal quotation marks omitted).

c. The Attorney General has discretion to adjust an alien's status to that of a lawful permanent resident under certain circumstances. 8 U.S.C. 1255. Most directly relevant here is Section 1255(i), which permits the Attorney General to grant adjustment of status to certain "grandfathered" aliens who are unlawfully present in the United States, but were "the beneficiary * * * of * * * an application for a labor certification under [8 U.S.C.] 1182(a)(5)(A) * * * that was filed pursuant to * * * regulations [issued by] the Secretary of Labor on or before" April 30, 2001. 8 U.S.C. 1255(i)(1)(B)(ii); *see* 8 C.F.R. 1245.10.

Adjustment of status through labor certification is a "long and discretionary * * * process." *Ahmed v. Gonzales*, 447 F.3d 433, 439 (5th Cir. 2006). First, a potential employer must file a labor certification application on an alien's behalf, which must establish, inter alia, that there is no United States citizen available to fill the job. *Khan v. Att'y Gen. of the U.S.*, 448 F.3d 226, 228 n.2 (3d Cir. 2006). Second, once the labor certification application is approved by the Department of Labor, the prospective employer must submit the approved labor certification, along with an employment-based visa petition (Form I-140), to the Department of Homeland Security (DHS). *See* 8 C.F.R. 204.5(a) and (a)(2). Third, once the employment-based visa petition is approved, the alien must apply for adjustment of status. *See* 8 C.F.R. 1245.2(a)(2); *Khan*, 448 F.3d at 228 n.2 (describing the "three-step

process" required for an alien to adjust status under Section 1255(i)). In this third and final phase, the alien must demonstrate that he satisfies the basic statutory eligibility requirements for adjustment of status under 8 U.S.C. 1255(a), *i.e.*, that he "is eligible to receive an immigrant visa and is admissible to the United States for permanent residence," and that "an immigrant visa is immediately available to [him] at the time the application is filed." 8 U.S.C. 1255(i)(2).

d. The INA provides that the Attorney General "may permit" certain removable aliens "voluntarily to depart the United States at the alien's own expense" in lieu of being removed. 8 U.S.C. 1229c(a)(1) and (b)(1). Aliens who are granted voluntary departure and comply with its terms avoid the period of inadmissibility that would otherwise result from departure following entry of an order of removal under 8 U.S.C. 1182(a)(9)(A), although other grounds of inadmissibility may still apply. See 8 C.F.R. 1241.7 ("an alien who departed before the expiration of [a] voluntary departure period * * * shall not be considered to [have been] deported or removed"). Voluntary departure also permits aliens "to choose their own destination points, to put their affairs in order without fear of being taken into custody at any time, [and] to avoid the stigma * * * associated with forced removals." *Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004).

To qualify for permission to depart voluntarily at the close of removal proceedings, an alien must satisfy certain statutory conditions, including "establish[ing] by clear and convincing evidence that [he] has the means to depart the United States and intends to do so." 8 U.S.C. 1229c(b)(1). Even if those

conditions are satisfied, the decision whether to permit an alien to depart voluntarily is discretionary with the Attorney General. *E.g.*, *Garcia-Mateo v. Keisler*, 503 F.3d 698, 700 (8th Cir. 2007); *see* generally 8 U.S.C. 1229c.

The INA and the Attorney General's regulations contain a number of provisions designed to ensure that aliens who have been granted the privilege of voluntary departure actually depart in a timely fashion. The INA strictly limits the period for which a grant of voluntary departure may last. For aliens who are granted that privilege at the conclusion of removal proceedings: "Permission to depart voluntarily * * * shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2). An IJ who grants voluntary departure must "also enter an alternate order [of] removal." 8 C.F.R. 1240.26(d). If the alien does not depart within the time specified in the order granting voluntary departure, the alternate order of removal becomes final and the alien becomes "ineligible for a period of 10 years" to receive certain forms of discretionary relief, including adjustment of status. 8 U.S.C. 1229c(d)(1)(B); *see* 8 C.F.R. 1240.26(a).

Finally, the INA contains a number of provisions addressing judicial review of voluntary departure orders and the alternate orders of removal that accompany them. Congress has provided that, "[n]otwithstanding any other provision of law * * * no court shall have jurisdiction to review * * * any judgment regarding the granting of relief under [the voluntary departure provision]." 8 U.S.C. 1252(1)(2)(B)(i). Another provision states that "[n]o court shall have jurisdiction over an appeal from

denial of a request for an order of voluntary departure, nor shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure." 8 U.S.C. 1229c(f). *Compare* 8 U.S.C. 1252(b)(3) (authorizing reviewing court to "stay removal" pending its decision on petition for judicial review).

2. Applicant, a native and citizen of India, was admitted to the United States in 1997 as a non-immigrant visitor with authorization to remain in the United States until May 7, 1998. Appl. App. B, at 6a. Applicant failed to depart the United States as required, and has remained in this country ever since. *Ibid.*

3. a. On August 24, 2004, DHS charged applicant with being removable for remaining in the United States longer than permitted by her visa. Appl. App. B, at 6a-7a.

On October 27, 2004, applicant appeared for a removal hearing before an IJ. Appl. App. B, at 7a. At that hearing, applicant's counsel advised the IJ that applicant believed that she was eligible for adjustment of status under the grandfathering provision in 8 U.S.C. 1255(i) "based upon a prior labor certification" application, and that applicant was attempting to get a different employer to file a new labor certification application on her behalf. A.R. 51-52. The IJ granted a continuance "for attorney prep[aration]," A.R. 51, specifically instructing applicant to be prepared at the next hearing to demonstrate not only that she had been the beneficiary of a pre-April 30, 2001, labor certification application, but also that the application was approvable when filed. A.R. 52.

Because of scheduling delays, applicant's next hearing was not held until June 16, 2005, more than seven months after the initial hearing. Appl. App. B, at 7a, 12a-21a. At that hearing, applicant conceded removability, *id.* at 7a, 14a, but asked the IJ to grant a further continuance, id. at 17a. Applicant submitted an "ACKNOWLEDGMENT LETTER" from the State of California stating that it had "received [an] APPLICATION FOR ALIEN EMPLOYMENT CERTIFICATION" filed on applicant's behalf, and that the application had a "[p]riority date [of] 4/30/2001." A.R. 71; *see* Appl. App. B, at 15a. Applicant informed the IJ, however, that the employer who had filed that application was no longer in business and that she no longer had a pending job offer from that employer. Appl. App. B, at 16a. Applicant stated that she was "in the process of" arranging for a new labor certification application based on a job offer in Illinois, but she acknowledged that the application had been neither filed nor approved. *Id.* at 17a. Applicant also informed the IJ that her son had applied to become a lawful permanent resident based on his marriage to a United States citizen. *Id.* at 15a.

The IJ denied applicant's request for a continuance. Appl. App. B, at 6a-11a. "[O]n the basic facts presented," the IJ stated, "this Court does not find * * * that [applicant] is even * * * eligible" for grandfathering under Section 1255(i). *Id.* at 9a.[1] The

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[1] At the hearing before he rendered his oral decision, the IJ had stated:

> I'm not deciding whether [applicant] has [Section 1255(i)] eligibility or not. You would have to show that this is an approvable filing. And I don't know if this is a valid company connection to [applicant], [because]

IJ further explained that, "[e]ven if [applicant] is * * * eligible" for grandfathering, there was no currently pending labor certification and "no evidence" that such an application would be "prima facie approvable." *Id.* at 9a. The IJ also stated that it was "speculative to conclude that [applicant] will be eligible for permanent residence through her son in the near future." *Id.* at 8a. Finally, the IJ stated that, even if he otherwise had the power to grant a continuance, he "would deny a continuance of this case solely in the exercise of discretion," *id.* at 9a, because of applicant's "flagrant[] violat[ion] of the immigration laws of the United States," *id.* at 8a. The IJ did, however, grant applicant's request for voluntary departure. *Id.* at 10a.

b. Applicant filed an administrative appeal to the BIA, which had the effect of rendering the IJ's order non-final and thus suspending both the voluntary departure period and the alternate order of removal pending appeal. 8 U.S.C. 1101(a)(47)(B)(i) (order "become[s] final" upon affirmance by the BIA or expiration of time for seeking BIA review); 8 U.S.C. 1229c(b)(1) (authorizing the Attorney General to permit voluntary departure "at the conclusion of a [removal] proceeding under section 1229a").

On July 21, 2006, the BIA entered an order "adopt[ing] and affirm[ing]" the IJ's decision in

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(continued...)

> thousands of people went out and filed applications on April 30, 2001 to be grandfathered in without any real plans to accept those job offers. So, at this time, I'm not even deciding the [Section 1255(i)] eligibility issue. * * *. But I'm not going to grant a continuance based on speculation.

relevant part. Appl. App. B, at 22a. The Board granted applicant "60 days from the date of this order," that is, until September 19, 2006, to depart voluntarily from the United States. *Ibid.*

4. a. On August 17, 2006, applicant filed a petition for review with the United States Court of Appeals for the Seventh Circuit. On September 5, 2006, applicant filed with the court of appeals a motion for a stay of voluntary departure. Appl. App. B, at 23a. On September 6, 2006 -- 13 days before the voluntary departure period granted by the BIA was to expire -- the court of appeals entered an order granting applicant's motion "to the extent that [applicant's] period of voluntary departure is TEMPORARILY STAYED pending resolution of the motion." On September 19, 2006, the government filed a statement of non-opposition to applicant's request for a stay of voluntary departure, stating that it "will not oppose [applicant's] request for a stay of voluntary departure at this time," but noting that this action did "not constitute * * * a concession that [applicant] has met her burden of proof for a stay of voluntary departure." *See generally Alimi v. Ashcroft*, 391 F.3d 888, 893 (7th Cir. 2004) (setting forth requirements for seeking a stay of voluntary departure from the court). On October 2, 2006, the court of appeals granted applicant's September 5 motion, ordering that her "period of voluntary departure is STAYED pending resolution of all matters in this court." Appl. App. B, at 23a.

b. On October 15, 2007, the court of appeals issued an unpublished order that dismissed applicant's petition for review in relevant part. Appl. App. B, at 1a-5a. Relying on its recent decision in *Ali v.*

Gonzales, 502 F.3d 659 (7th Cir.), *petition for cert. pending*, No. 07-798 (Dec. 12, 2007), and *application for stay pending*, No. 07A584 (Jan. 9, 2008), the court of appeals concluded that 8 U.S.C. 1252(a)(2)(B)(ii) "generally precludes judicial review" of continuance decisions of immigration judges. Appl. App. B., at 3a (quoting Ali, 502 F.3d at 661). The court further determined that applicant's case did not fall "within the limited jurisdictional exception" that its cases had recognized for situations in which, absent a continuance, the government's own failure to act on a pending labor certification application would "effectively strip[] [an alien of his] eligibility to adjust status." *Id.* at 3a-4a. The court of appeals explained that because applicant's "labor certification application was not pending when she sought a continuance," "it was not government inaction that cut off [applicant's] eligibility to adjust status, but her lack of a viable labor certification application." *Id.* at 4a.

The court of appeals also viewed the IJ's decision as concluding that applicant had not demonstrated that she was eligible for grandfathering under Section 1255(i). Appl. App. B, at 4a. Applicant's "failure to mention that finding -- let alone challenge it -- either before the BIA or in her petition in this court," the court determined, "waives any challenge to that aspect of the IJ's ruling." Ibid. And because of that "unchallenged finding," the court of appeals determined that "the denial of her request for a continuance does not arbitrarily strip [applicant] of a Congressionally-conferred benefit," and thus "does not fall within [any] exception to the general bar against jurisdiction" to consider an IJ's denial of a continuance. *Ibid.*

c. Applicant filed a petition for rehearing with a suggestion for rehearing en banc. On December 27, 2007, the court of appeals denied rehearing. Appl. App. B, at 24a.

d. According to the court of appeals' clerk's office, the court's mandate issued on January 4, 2008, the day on which the court issued an agency closing letter.[2] That same day, applicant filed with the court of appeals an application for a stay of voluntary departure pending resolution of a petition for a writ of certiorari. Appl App. B, at 25a-37a. On January 7, 2008, the court of appeals denied that application. *Id.* at 38a.

ARGUMENT

1. As we explain below (*see* pp. 17-27, infra), the application for a stay of voluntary departure should be denied under the general principles governing such stays in this Court. But there is a threshold issue, which the application does not meaningfully address: whether a federal court has the authority to stay the expiration of a period of voluntary departure granted by the BIA. The government's position is that reviewing courts lack that authority.

Applicant cites 28 U.S.C. 2101(f), which provides that "[i]n any case in which the final judgment or decree of any court is subject to review * * * on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed * * * to enable the

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[2] Under Federal Rule of Appellate Procedure 41(b), a court of appeals' mandate "must issue * * * 7 calendar days after entry of an order denying a timely petition for rehearing," but "[t]he court may shorten or extend the time." Under the normal application of Rule 41(b), therefore, the court of appeals' mandate would have issued on January 3, 2008.

party aggrieved to obtain a writ of certiorari." See Appl. 4. That provision is inapplicable. Applicant is not seeking a stay of the Seventh Circuit's "judgment or decree"; she is seeking to prevent the expiration of a form of substantive relief that the BIA granted as a matter of administrative discretion. Applicant also cites (Appl. 4) this Court's Rule 23.1, which states that "[a] stay may be granted by a Justice as permitted by law." That provision, however, simply raises the question of whether the INA forbids a federal court from staying the expiration of a voluntary departure period.

a. The lower courts are divided with respect to that question. A majority of the courts of appeals have concluded that they have the authority to stay the running of a voluntary departure period, at least in situations in which the request to do so is made before the voluntary departure period expires.[3] In contrast, the Fourth Circuit has held that a court of appeals lacks the power to stay or otherwise extend the period during which an alien's permission to depart voluntarily remains valid. *Ngarurih v. Ashcroft*, 371 F.3d 182, 194 (2004).

That conflict in lower-court authority may itself warrant this Court's plenary review in an appropriate case. It should not, however, be resolved in the absence of full briefing, and in the context of

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[3] *Bocova v. Gonzales*, 412 F.3d 257, 266 (1st Cir. 2005); *Thapa v. Gonzales*, 460 F.3d 323, 325 (2d Cir. 2006); *Obale v. Attorney Gen.*, 453 F.3d 151, 157 (3d Cir. 2006); *Vidal v. Gonzales*, 491 F.3d 250, 252 (5th Cir. 2007); *Nwakanma v. Ashcroft*, 352 F.3d 325, 327 (6th Cir. 2003); *Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 654 (7th Cir. 2004); *Rife v. Ashcroft*, 374 F.3d 606, 615-616 (8th Cir. 2004); *El Himri v. Ashcroft*, 344 F.3d 1261, 1262 (9th Cir. 2003).

an emergency stay application that does not even acknowledge the conflict's existence and seeks to obtain plenary review with respect to an entirely unrelated question of immigration procedure.

b. The application should also be denied because the INA does not permit a federal court to stay the expiration of a voluntary departure period, much less to extend such a period beyond the outer time limits that Congress has expressly provided for such grants of discretionary relief.[4] With respect to aliens, such as applicant, who are granted voluntary departure at the conclusion of removal proceedings, Congress has directed that "[p]ermission to depart voluntarily * * * shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2). That strict time limitation on grants of voluntary departure reflects Congress's "intention to offer an alien a specific benefit -- exemption from the ordinary bars on subsequent relief -- in return for a quick departure at no cost to the government." *Ngarurih*, 371 F.3d 194. Because the BIA already granted applicant 60 days in which to depart voluntarily, see Appl. App. B, at 22a, any

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[4] Although the government did not contest the court of appeals' power to grant a stay of voluntary departure in this case, the Seventh Circuit had previously issued a precedential decision holding that it has the power to do so. *See Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 654 (2004). As a result, the issue is properly before this Court. *Cf. United States v. Williams*, 504 U.S. 36, 44-45 (1992). In addition, to the extent that the issue of whether a federal court may stay the expiration of a voluntary departure period implicates a question of "adjudicatory authority," *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004), the Court would be required to consider it *sua sponte* in any event.

further extension of that period would exceed Congress's clear mandate.[5]

In addition, the INA and its accompanying regulations make clear that, like the power to grant voluntary departure in the first place, see 8 U.S.C. 1229c(a)(1) and (b)(1), the ability to extend an initial period of voluntary departure is vested exclusively in the Executive Branch. Whereas Congress has expressly authorized courts to order a stay of an alien's physical removal pending consideration of a petition for judicial review, *see* 8 U.S.C. 1252(b)(3)(B), it conferred no comparable authority with respect to stays of voluntary departure. To the contrary, the INA has provided since 1996 that "[n]o court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure * * *, nor shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure." 8 U.S.C. 1229c(f). The INA further expressly provides, in its

[5] The INA makes clear that an alien's decision to seek judicial relief by way of a petition for review does not by itself stay or otherwise extend the period during which a grant of permission to depart voluntarily remains valid. Whereas the filing of an administrative appeal to the BIA prevents an IJ's decision from becoming final and thus prevents the commencement of a voluntary departure period, *see* 8 U.S.C. 1101(a)(47)(B)(i), 1229c(b)(1), an order by the BIA is final when issued, *see* 8 U.S.C. 1101(a)(47)(B)(i), even where (unlike here) a motion to reopen was filed, *see* Stone v. INS, 514 U.S. 386 (1995). In addition, Congress has declared that the filing of a petition for review with a court does not, by itself, stay even an alien's physical removal from the United States. *See* 8 U.S.C. 1252(b)(3)(B) ("Service of the petition [for review] on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.").

judicial review section, that "[n]otwitstanding any other provision of law (statutory or nonstatutory), including * * * sections 1361 and 1651 of [Title 28] * * * no court shall have jurisdiction to review * * * any judgment regarding the granting of relief under" the provisions authorizing voluntary departure. 8 U.S.C. 1252(a)(2)(B)(1). A stay of a grant of voluntary departure would necessarily entail prohibited "review" of that relief.

Moreover, a stay is granted by a court only in aid of its jurisdiction to review the merits of whatever it has stayed. *See, e.g.*, 28 U.S.C. 1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."). For that reason as well, because a court may not review a determination concerning the granting of voluntary departure, it may not stay the running of a voluntary departure period. Section 1252(a)(2)(B)(1) thus further refutes any suggestion that Congress intended for courts to be able to extend a voluntary departure period, which was permitted by the Attorney General in the first place only as a matter of discretion, simply by issuing a stay. *Ngarurih*, 371 F.3d at 193. In addition, regulations issued under the INA provide that "[a]uthority to extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is only within the jurisdiction of" certain specified DHS officials. 8 C.F.R. 1240.26(f); *see ibid.* (providing that "[i]n no event can the total period of time, including an

extension, exceed 120 days or 60 days as set forth in [8 U.S.C. 1229c]").[6]

2. Even assuming that a court may stay the expiration of a voluntary departure period, moreover, the present application does not present "the 'extraordinary circumstances' necessary to justify a stay." *Williams v. Zbaraz,* 442 U.S. 1309, 1312 (1979) (Stevens, J., in chambers) (quoting *Graves v. Barnes*, 405 U.S. 1201, 1203 (Powell, J., in chambers)). "The practice of the Justices has consistently been to grant a stay only when * * * [t]here [is] [1] a reasonable probability that certiorari will be granted, [2] a significant possibility that the judgment below will be reversed, and [3] a likelihood of irreparable harm * * * if the judgment below is not stayed." *Edwards v. Hope Med. Group for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers); *accord McGraw-Hill Co. v. Proctor & Gamble Co.*, 515 U.S. 1309, 1310 (1995) (Stevens, J., in chambers); *Williams,* 442 U.S. at 1311 (Stevens, J., in chambers). Because applicant cannot satisfy the first and the third of these

[6] The fact that courts may not stay the running of a voluntary departure period does not prevent aliens such as applicant from obtaining judicial review of any substantive defenses that they may have to the underlying removal order. In 1996, Congress repealed a provision that had barred courts from reviewing final deportation orders of aliens who had already departed or been removed from the United States. IIRIRA § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. 1105a(c) (1994)). As a result, under current practice, an alien may comply with the terms of a voluntary departure order without forfeiting his ability to obtain judicial review of the underlying alternate removal order. *See Ngarurih*, 371 F.3d at 192-193. Proposed regulations promulgated by the Attorney General on November 30, 2007, if adopted, would provide that a grant of voluntary departure shall terminate upon the filing of a petition for review. *See* 72 Fed. Reg. 67,674.

requirements, her application for a stay of voluntary departure should be denied, even if a court has jurisdiction or authority to grant such a stay.

a. In her draft petition for a writ of certiorari, which is appended to her stay application, applicant seeks review of the court of appeals' determination that 8 U.S.C. 1252(a)(2)(B)(ii) precluded it from reviewing the IJ's denial of her request to continue her removal proceedings. Appl. App. A, at i. Although the courts of appeals are divided with respect to that question, applicant cannot demonstrate that there is a reasonable probability that certiorari will be granted in this case.

i. The federal courts of appeals are in conflict regarding whether they have jurisdiction under the INA to review an IJ's denial of a continuance. In the decision below, the Seventh Circuit adhered to its earlier decision in *Ali v. Gonzales*, 502 F.3d 659 (7th Cir.), *petition for cert. pending*, No. 07-798 (Dec. 12, 2007), and *application for stay pending*, No. 07A584 (Jan. 9, 2008), which held that 8 U.S.C. 1252(a)(2)(B)(ii) "generally precludes judicial review" of continuance decisions of immigration judges. Appl. App. B., at 3a (quoting *Ali*, 502 F.3d at 661). The Eighth and Tenth Circuits have reached the same conclusion. *See Yerkovich v. Ashcroft*, 381 F.3d 990, 993 (10th Cir. 2004); *Onyinkwa v. Ashcroft*, 376 F.3d 797, 799 (8th Cir. 2004). Those courts have reasoned that an IJ's decision to grant or deny a request for a continuance is a "decision or action * * * the authority for which is specified under" the relevant subchapter of the INA (8 U.S.C. 1151-1381), 8 U.S.C. 1252(a)(2)(B)(ii), because it derives from regulations that the Attorney General promulgated

to implement 8 U.S.C. 1229a(a) and (b), the statutory provisions authorizing IJs to conduct removal proceedings, and that in turn specify that the power to grant continuances is within the discretion of IJs. *Yerkovich*, 381 F.3d at 993; *Onyinkwa*, 376 F.3d at 799.

The majority of circuit courts have reached a contrary conclusion. The First, Second, Third, Fourth, Fifth, Ninth, and Eleventh Circuits have all concluded that a decision by an IJ to grant or deny a continuance is not a decision "the authority for which is specified" under the relevant subchapter "to be in the discretion of the Attorney General," 8 U.S.C. 1252(a)(2)(B)(ii), because an IJ's discretionary authority to act on a motion for a continuance is specified in a regulation, not a statutory provision within the relevant subchapter itself. *See Lendo v. Gonzales*, 493 F.3d 439, 441 n.1 (4th Cir. 2007); *Alsamhouri v. Gonzales*, 484 F.3d 117, 122 (1st Cir. 2007); *Zafar v. United States Att'y Gen.*, 461 F.3d 1357, 1360 (11th Cir. 2006); *Khan v. Attorney Gen. of the U.S.*, 448 F.3d 226, 232-233 (3d Cir. 2006); *Ahmed v. Gonzales*, 447 F.3d 433, 436-437 (5th Cir. 2006); *Sanusi v. Gonzales*, 445 F.3d 193, 198-199 & n.8 (2d Cir. 2006) (per curiam).[7] The Sixth Circuit has reached the same result through a different analysis, concluding that "Section 1252(a)(2)(B)(ii)

[7] Although the Ninth Circuit has not issued a published decision addressing whether the INA bars judicial review of an IJ's discretionary denial of a continuance, it has agreed with the majority position in an unpublished, nonprecedential opinion. *See Martinez v. Gonzales*, 166 Fed. App'x 300, 300 (2006); *see also Medina-Morales v. Ashcroft*, 371 F.3d 520, 528 (9th Cir. 2004) (holding that Section 1252(a)(2)(B)(ii) does not preclude federalcourtreview of an IJ's denial of a motion to reopen).

only applies to the portions of subchapter II left to the Attorney General's discretion, not the portions of subchapter II that leave discretion with IJs in matters where IJs are merit decision-makers that are subject to [the courts of appeals'] review." *Abu-Khaliel v. Gonzales*, 436 F.3d 627, 632, 634 (6th Cir. 2006).

As the government concluded over a year ago, the majority position represents the better reading of the statute. *See generally* Gov't Br. in *Alsamhouri*, *supra* (discussed at p. 22, *infra*). The relevant statutory text requires that the "authority" for the "decision or action" at issue -- here, the denial of a continuance -- be "specified under this subchapter [subchapter II of Chapter 12 of Title 8] to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B)(ii). Nothing in the relevant statutory "subchapter," however, mentions continuances, or "specifie[s]" that they may be granted "in the discretion of the Attorney General." Rather, an IJ's authority to continue a case derives from regulations promulgated to implement statutory provisions that broadly authorize IJs to conduct removal hearings, but do not specifically authorize them to grant or deny continuances. *See, e.g.*, 8 U.S.C. 1229a(a)(1). Given the general presumption in favor of judicial review, *INS v. St. Cyr*, 533 U.S. 289, 298 (2001), and the terms of Section 1252(a)(2)(B)(ii), the government agrees with the majority of circuit courts that an IJ's discretionary decision to deny a continuance is not covered by the jurisdictional bar in 8 U.S.C. 1252(a)(2)(B)(ii). The government did not argue otherwise to the court below. *See* Gov't C.A. Br. 9 n.1.

ii. Although the courts of appeals are divided with respect to the underlying question upon which applicant seeks review, this Court's plenary consideration is not warranted at this time, because the conflict in lower-court authority may well resolve itself without this Court's intervention. Prior to December 2006, the government had taken the position that 8 U.S.C. 1252(a)(2)(B)(ii) precludes federal-court review of an IJ's denial of a continuance. In December 2006, in response to a petition for rehearing in *Alsamhouri v. Gonzales*, 484 F.3d 117 (1st Cir. 2007), the government reconsidered its position and concluded that the view of the majority of courts is correct. *See* Gov't Br. 7-13, Alsamhouri v. Gonzales, supra. In Alsamhouri, the First Circuit initially had held that it "ha[d] no jurisdiction over whether the denial of a continuance was an abuse of discretion." 458 F.3d 15, 16 (1st Cir. 2006), *withdrawn on petition for reh'g*, 471 F.3d 209 (1st Cir. 2006). In response to the government's change in position, the court of appeals reversed course, "adopt[ed] the majority rule," and held that it "ha[d] jurisdiction to review a denial of a continuance." 484 F.3d at 122. Other courts that have adopted the minority position may well reconsider their holdings in light of the government's recent change in position. *See Ikenokwalu-White v. Gonzales*, 495 F.3d 919, 924 n.2 (8th Cir. 2007) (suggesting that "it may be appropriate for our court to revisit this issue en banc").[8] It would thus be

[8] In its decision in *Ali*, a panel of the Seventh Circuit acknowledged the Attorney General's recent change in position, but stated that it "disagree[d]" with the Attorney General's view. 502 F.3d at 660. The opinion further stated that it had "been circulated among all judges of this Court in regular active

prudent for this Court to decline to resolve the disagreement in the circuit courts at this time.

iii. Even if the existing conflict in lower court authority were presently ripe for this Court's review, moreover, this case would be an unsuitable vehicle for resolving it.

The claim upon which applicant sought to obtain review in the court of appeals -- that the IJ abused his discretion in denying her request for a continuance -- is meritless. As the BIA recognized, Appl. App. B, at 22a, the IJ cited two independently sufficient bases for denying a continuance. First, at the time she made her request, applicant, despite already having had her removal hearing continued for more than seven months, was still unable to establish prima facie eligibility for adjustment of

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(continued...)

service," and that "[a] majority did not favor rehearing en banc on the question of whether the jurisdiction-stripping provision, 8 U.S.C. § 1252(a)(2)(B)(ii), applies to continuance decisions of immigration judges"; the opinion also noted, however, that four judges had voted to rehear the case en banc. *Id.* at 661 n.1. On December 10, 2007, the Seventh Circuit issued an order directing the government to respond to a petition for rehearing *en banc* in *Potdar v. Keisler*, 505 F.3d 680 (7th Cir. 2007). The threshold question raised by that petition for rehearing is whether the panel erred in concluding that "it lacked jurisdiction under * * * [8 U.S.C.] 1252(a)(2)(B)(ii) to review a denial of a continuance requested by [the alien] to enable him to pursue an application for adjustment of status." Pet. for Rehearing with Suggestion for Rehearing *En Banc*, in *Potdar*, *supra*, at 1. On January 11, 2008, the government filed with the Seventh Circuit a request for an additional thirty days in which to respond to the petition for rehearing in Potdar. It therefore appears that the Seventh Circuit itself may reconsider its ruling on this issue.

status or any non-speculative prospect of being able to do so. *Id.* at 7a-9a, 22a. Second, the IJ also determined that applicant would not merit a favorable exercise of discretion in any event because she had flagrantly violated the immigration laws by remaining in the United States illegally for nearly three years before even attempting to acquire some form of legal status. *Id.* at 2a, 8a-9a, 22a. Because the IJ gave "a rational explanation" for his refusal to grant a continuance, and because that decision did not constitute an "inexplicabl[e] depart[ure] from established policies, or * * * rest[] on an impermissible basis," no abuse of discretion could be established here. *Castaneda-Suarez v. INS*, 993 F.2d 142, 146 (7th Cir. 1993) (quoting *Cordoba-Chaves v. INS*, 946 F.2d 1244, 1246 (7th Cir. 1991)).

In addition, any possible error in denying a continuance would have been harmless. In order to be properly "grandfathered" under Section 1255(i), applicant would have needed to show that the initial labor certification application filed on her behalf was "approvable when filed." 8 U.S.C. 1255(i)(1)(B)(ii); 8 C.F.R. 1245.10(a)(1)(i)(B). At her removal hearing, applicant conceded that the company that filed the 2001 labor certification application was no longer in business, and that she no longer had a pending job offer from that company. Appl. App. B, at 16a. And "[o]n the basic facts presented," which involved nothing more thana one-page acknowledgment letter stating that an application had been filed, the IJ stated that he was unable to "find that [applicant] is even * * * eligible" for grandfathering under Section 1255(i). *Id.* at 9a.[9] As the court of appeals correctly

[9] Applicant asserts (Appl. 10 n.3) that the court of appeals erred in concluding that the IJ had found her ineligible to seek

determined, *id.* at 4a, applicant forfeited the ability to challenge the correctness of that determination by failing to challenge it before the BIA or the court of appeals.

b. Nor can applicant demonstrate "a likelihood of irreparable harm * * * if the judgment below is not stayed." *Edwards*, 512 U.S. at 1302 (Scalia, J., in chambers). Applicant contends that "[t]he key to [her] claim in the courts below was her eligibility to adjust her immigration status under [8 U.S.C. 1255(i)]." Appl. 9-10. But, as just explained, the IJ determined that applicant had been unable, even after several continuances, to establish that she is prima facie eligible for grandfathering under Section 1255(i), and the court of appeals determined that applicant had forfeited the ability "to receive a ruling on the merits of her [Section 1255(i)] claim" (Appl. 10) by failing to raise the issue before the BIA or the Seventh Circuit.

Applicant is also mistaken that "the potential harm to the [g]overnment [in granting a stay] is

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(continued...)

adjustment of status under Section 1255(i), citing a statement by the IJ during the removal hearing that he was "not deciding whether [applicant] has [Section 1255(i)] eligibility or not." (quoting Appl. App. B, at 17a). But it was applicant's burden to establish her prima facie eligibility for Section 1255(i) relief, and, as noted above, the IJ expressly found in his oral ruling that applicant had failed to do. Appl. App. B, at 9a; *see id.* at 18a (stating that, as of the date of her final removal hearing, it would require "speculation" to conclude that applicant was eligible for Section 1255(i) relief). In any event, the court of appeals clearly determined that the IJ had made such a finding, *id.* at 4a, and that sort of case-specific determination by a court of appeals does not merit this Court's review.

virtually nonexistent." Appl. 10. Applicant has been found removable by the Executive Branch agency charged by Congress with making that determination. The agency's decision has been upheld by the federal court of appeals to which applicant took her judicial appeal as of right. Applicant's request for further review by this Court is unlikely to be granted, and, in the unlikely event that it is granted, she is unlikely to prevail on her underlying claim. Once applicant's voluntary departure period expires, and if she does not depart as promised, the government will wish to execute the order of removal as soon as necessary steps have been taken. Under these circumstances, the interests of the government will indeed be harmed if a stay is granted.

Finally, a stay would not serve the public interest. In enacting IIRIRA, Congress determined that "facilitating the prompt deportation of an alien after entry of a removal order" would best serve the public interest. *Tapia Garcia v. INS*, 237 F.3d 1216, 1217 (10th Cir. 2001). Granting a stay would be inconsistent with that congressional judgment, and would frustrate "the public interest in the speedy and effective enforcement of the immigration laws as applied to aliens who have not made a satisfactory showing of entitlement to [relief from removal]." *Sofinet v. INS*, 188 F.3d 703, 708 (7th Cir. 1999); *cf. Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490 (1999) ("[T]he consequence of delay * * * in deportation proceedings * * * is to permit and prolong a continuing violation of United States law."). The potential harm to the public interest is especially pronounced here, where applicant has been unlawfully present in the United States for nearly

ten years despite the lack of any colorable claim of mistake or entitlement to adjust her status, and where she has already succeeded in deferring the final resolution of her removal proceedings for more than three years.

CONCLUSION

The application for a stay of removal should be denied.

Respectfully submitted.

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No. 07-1005

In the Supreme Court of the United States

INDU GULATI, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a federal court of appeals lacks jurisdiction under 8 U.S.C. 1252(a)(2)(B)(ii) (Supp. V 2005) to review an immigration judge's denial of an alien's request to continue removal proceedings.

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In the Supreme Court of the United States

No. 07-1005

INDU GULATI, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not published in the *Federal Reporter* but is available at 2007 WL 2988632. The decisions of the Board of Immigration Appeals (Pet. App. 8a-10a) and the immigration judge (Pet. App. 11a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 2007. A petition for rehearing was denied on December 27, 2007 (Pet. App. 25a-26a). The petition for a writ of certiorari was filed on January 17, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1996, Congress amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to expedite the removal of criminal and other illegal aliens from the United States. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. As relevant here, Congress amended the INA to limit judicial review of certain discretionary decisions of the Attorney General. As amended, the relevant section of the INA now provides that no court shall have jurisdiction to review any

> decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. 1252(a)(2)(B)(ii) (Supp. V 2005). The phrase "this subchapter" refers to Title 8 of the United States Code, Chapter 12, Subchapter II, which is codified at 8 U.S.C. 1151-1381 and pertains broadly to immigration matters. See *Van Dinh* v. *Reno*, 197 F.3d 427, 433 (10th Cir. 1999).

b. The Attorney General has promulgated regulations that provide rules of procedure for administrative removal proceedings, in order to "assist in the expeditious, fair, and proper resolution of matters coming before Immigration Judges." 8 C.F.R. 1003.12. Under those rules of procedure, if an alien seeks a continuance of proceedings, "[t]he Immigration Judge may grant a motion for continuance for good cause shown." 8 C.F.R. 1003.29; see 8 C.F.R. 1240.6 ("After the commencement

of the hearing, the immigration judge may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Service.").

"The grant of a continuance is within the [immigration judge's] broad discretion." *Zafar* v. *United States Attorney Gen.*, 461 F.3d 1357, 1362 (11th Cir. 2006). To obtain reversal by the Board of Immigration Appeals (BIA) of the denial of a continuance by an immigration judge (IJ), an alien must show "that the denial caused [her] actual prejudice and harm and materially affected the outcome of [her] case." *In re Villarreal-Zuniga*, 23 I. & N. Dec. 886, 891 (B.I.A. 2006) (quotation marks omitted).

c. The Attorney General has discretion to adjust an alien's status to that of a lawful permanent resident under certain circumstances. 8 U.S.C. 1255 (2000 & Supp. V 2005). Most directly relevant here is Section 1255(i), which permits the Attorney General to grant adjustment of status to certain "grandfathered" aliens who are unlawfully present in the United States, but were "the beneficiary * * * of * * * an application for a labor certification under [8 U.S.C.] 1182(a)(5)(A) * * * that was filed pursuant to * * * regulations [issued by] the Secretary of Labor on or before" April 30, 2001. 8 U.S.C. 1255(i)(1)(B)(ii); see 8 C.F.R. 1245.10.

Adjustment of status through labor certification is a "long and discretionary process." *Ahmed* v. *Gonzales*, 447 F.3d 433, 439 (5th Cir. 2006). First, a potential employer must file a labor certification application on an alien's behalf, which must establish, *inter alia*, that there is no United States citizen available to fill the job. *Khan* v. *Attorney Gen. of the United States*, 448 F.3d 226, 228 n.2 (3d Cir. 2006). Second, if the labor certifica-

tion application is approved by the Department of Labor, the prospective employer must submit the approved labor certification, along with an employment-based visa petition (Form I-140), to the Department of Homeland Security (DHS). See 8 C.F.R. 204.5(a) and (a)(2). Third, if the employment-based visa petition is approved, the alien must apply for adjustment of status. See 8 C.F.R. 1245.2(a)(2); *Khan*, 448 F.3d at 228 n.2 (describing the "three-step process" required for an alien to attain employment-based permanent residency under Section 1255(i)). In this third and final phase, the alien must demonstrate that he satisfies the basic statutory eligibility requirements for adjustment of status under 8 U.S.C. 1255(a)—*i.e.*, that he "is eligible to receive an immigrant visa and is admissible to the United States for permanent residence," and that "an immigrant visa is immediately available to [him] at the time the application is filed." 8 U.S.C. 1255(i)(2).

d. The INA provides that the Attorney General "may permit" certain removable aliens "voluntarily to depart the United States at the alien's own expense" in lieu of being removed. 8 U.S.C. 1229c(a)(1) and (b)(1). Aliens who are granted voluntary departure and comply with its terms avoid the period of inadmissibility that would otherwise result from departure following entry of an order of removal under 8 U.S.C. 1182(a)(9)(A). See 8 C.F.R. 1241.7 (providing that "an alien who departed before the expiration of [a] voluntary departure period * * * shall not be considered to [have been] deported or removed"). Voluntary departure also permits aliens "to choose their own destination points, to put their affairs in order without fear of being taken into custody at any time, [and] to avoid the stigma * * * associated

with forced removals." *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004).

To qualify for permission to depart voluntarily at the close of removal proceedings, an alien must satisfy certain statutory conditions, including "establish[ing] by clear and convincing evidence that he has the means to depart the United States and intends to do so." 8 U.S.C. 1229c(b)(1)(D). Even if those conditions are satisfied, the decision whether to permit an alien to depart voluntarily is discretionary with the Attorney General. See *e.g.*, *Garcia-Mateo* v. *Keisler*, 503 F.3d 698, 700 (8th Cir. 2007); see generally 8 U.S.C. 1229c (2000 & Supp. V 2005).

The INA and the Attorney General's regulations contain a number of provisions designed to ensure that aliens who have been granted the privilege of voluntary departure actually depart in a timely fashion. The INA strictly limits the period for which a grant of voluntary departure may last. For aliens who are granted that privilege at the conclusion of removal proceedings: "Permission to depart voluntarily * * * shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2). An IJ who grants voluntary departure must "also enter an alternate order [of] removal." 8 C.F.R. 1240.26(d). If the alien does not depart within the time specified in the order granting voluntary departure, the alternate order of removal becomes final and the alien becomes "ineligible, for a period of 10 years," to receive certain forms of discretionary relief, including adjustment of status under 8 U.S.C. 1255 (2000 & Supp. V 2005). See 8 U.S.C. 1229c(d)(1)(B) (Supp. V 2005); 8 C.F.R. 1240.26(a).

Finally, the INA contains a number of provisions addressing judicial review of voluntary departure orders

and the alternate orders of removal that accompany them. Congress has provided that, "[n]otwithstanding any other provision of law * * * no court shall have jurisdiction to review * * * any judgment regarding the granting of relief under [the voluntary departure provision]." 8 U.S.C. 1252(a)(2)(B)(i) (2000 & Supp. V 2005). Another provision states that "[n]o court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure, * * * nor shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure." 8 U.S.C. 1229c(f). Compare 8 U.S.C. 1252(b)(3) (authorizing reviewing court to "stay * * * removal" pending its decision on petition for judicial review of order of removal).

2. Petitioner, a native and citizen of India, was admitted to the United States in 1997 as a non-immigrant visitor with authorization to remain in the United States until May 7, 1998. Pet. App. 11a. Petitioner failed to depart the United States as required, and has remained in this country ever since. *Ibid.*

3. a. On August 24, 2004, DHS charged petitioner with being removable for remaining in the United States longer than permitted by her visa. Pet. App. 11a-12a.

On October 27, 2004, petitioner appeared for a removal hearing before an IJ. Pet. App. 12a. At that hearing, petitioner's counsel informed the IJ that petitioner believed that she was eligible for adjustment of status under the grandfathering provision in 8 U.S.C. 1255(i) "based upon a prior labor certification" application, and that petitioner was attempting to get a different employer to file a new labor certification application on her behalf. A.R. 51-52; Pet. App. 12a-13a. The IJ granted a continuance "for attorney prep[aration],"

A.R. 51, specifically instructing petitioner to be prepared at the next hearing to demonstrate not only that she had been the beneficiary of a pre-April 30, 2001 labor certification application, but also that the application was approvable when filed. A.R. 52.

Because of scheduling delays, petitioner's next hearing was not held until June 16, 2005, more than seven months after the initial hearing. Pet. App. 12a, 16a-24a. At that hearing, petitioner conceded removability, *id.* at 12a, 18a, but asked the IJ to grant a further continuance, *id.* at 20a. Petitioner submitted an "ACKNOWLEDGMENT LETTER" from the State of California stating that it had "received [an] APPLICATION FOR ALIEN EMPLOYMENT CERTIFICATION" filed on petitioner's behalf, and that the application had a "[p]riority date [of] 4/30/2001." A.R. 71; see Pet. App. 18a. Petitioner informed the IJ, however, that the employer who had filed that application was no longer in business and that she no longer had a pending job offer from that employer. *Id.* at 19a. Petitioner stated that she was "in the process of" arranging for a new labor certification application based on a job offer in Illinois, but she acknowledged that the application had been neither filed nor approved. *Id.* at 20a. Petitioner also informed the IJ that her son had applied to become a lawful permanent resident based on his marriage to a United States citizen. *Id.* at 18a.

The IJ denied petitioner's request for a continuance. Pet. App. 13a-15a, 21a. "[O]n the basic facts presented," the IJ stated, "this Court does not find * * * that [petitioner] is even * * * eligible" for grandfathering

under Section 1255(i). *Id.* at 14a.[1] The IJ further remarked that, "[e]ven if [petitioner] is * * * eligible" for grandfathering, there was no currently pending labor certification and "no evidence" that such an application would be "prima facie approvable." *Ibid.* The IJ also stated that it was "speculative to conclude that [petitioner] will be eligible for permanent resident status through her son in the near future." *Id.* at 13a. Finally, the IJ stated that, even if he otherwise had the power to grant a continuance, he "would deny a continuance of this case solely in the exercise of discretion," *id* at 14a, because of petitioner's "flagrant[] violat[ion of] the immigration laws of the United States," *id.* at 13a. The IJ did, however, grant petitioner's request for voluntary departure. *Id.* at 15a.

b. Petitioner filed an administrative appeal to the BIA, which had the effect of rendering the IJ's order non-final and thus suspending both the voluntary departure period and the alternate order of removal pending appeal. 8 U.S.C. 1101(a)(47)(B)(i) and (ii) (order "become[s] final" upon affirmance by the BIA or expiration of time for seeking BIA review); 8 U.S.C. 1229c(b)(1) (authorizing the Attorney General to permit voluntary

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[1] At the hearing before he rendered his oral decision, the IJ had stated:

> I'm not deciding whether [petitioner] has [Section 1255(i)] eligibility or not. You would have to show that this is an approvable filing. And I don't know if this is a valid company connection to [petitioner], [because] thousands of people went out and filed applications on April 30, 2001 to be grandfathered in without any real plans to accept those job offers. So, at this time, I'm not even deciding the [Section 1255(i)] eligibility issue. * * * But I'm not going to grant a continuance based upon speculation.

Pet. App. 20a-21a.

departure "at the conclusion of a [removal] proceeding under section 1229a").

On July 21, 2006, the BIA entered an order "adopt-[ing] and affirm[ing]" the IJ's decision in relevant part. Pet. App. 8a-10a. The Board granted petitioner "60 days from the date of this order," that is, until September 19, 2006, to depart voluntarily from the United States. *Id.* at 9a.

4. a. On August 17, 2006, petitioner filed a petition for review with the United States Court of Appeals for the Seventh Circuit. On September 5, 2006, petitioner filed with the court of appeals a motion for a stay of voluntary departure. Pet. App. 27a. On September 6, 2006—13 days before the voluntary departure period granted by the BIA was to expire—the court of appeals entered a minute order granting petitioner's motion "to the extent that [petitioner's] period of voluntary departure is temporarily STAYED pending resolution of the motion." On September 19, 2006, the government filed a statement of non-opposition to petitioner's request for a stay of voluntary departure, stating that it "will not oppose [petitioner's] request for a stay of voluntary departure at this time," but noting that this action did "not constitute * * * a concession that [petitioner] has met her burden of proof for a stay of voluntary departure." See generally *Alimi* v. *Ashcroft*, 391 F.3d 888, 892-893 (7th Cir. 2004) (setting forth requirements for seeking a stay of voluntary departure from that court). On October 2, 2006, the court of appeals granted petitioner's September 5 motion, ordering that her "period of voluntary departure is STAYED pending resolution of all matters in this court." Pet. App. 27a-28a.

b. On October 15, 2007, the court of appeals issued an unpublished order that dismissed petitioner's petition

for review in relevant part. Pet. App. 1a-7a. Relying on its recent decision in *Ali* v. *Gonzales*, 502 F.3d 659 (7th Cir. 2007), petition for cert. pending, No. 07-798 (filed Dec. 12, 2007), and application for stay denied, No. 07A583 (Jan. 15, 2008), the court of appeals concluded that 8 U.S.C. 1252(a)(2)(B)(ii) (Supp. V 2005) "generally precludes judicial review of continuance decisions of immigration judges." Pet. App. 4a (quoting *Ali*, 502 F.3d at 660). The court further determined that petitioner's case did not fall "within the limited jurisdictional exception" that its cases had recognized for situations in which, absent a continuance, the government's own failure to act on a pending labor certification application would "effectively strip[] [an alien of her] eligibility to adjust status." *Id.* at 5a-6a. The court of appeals explained that because petitioner's "labor certification application was not pending when she sought a continuance," "it was not government inaction that cut off [petitioner's] eligibility to adjust status, but her lack of a viable labor certification application." *Id.* at 6a.

The court of appeals also viewed the IJ's decision as concluding that petitioner had not demonstrated that she was eligible for grandfathering under Section 1255(i). Pet. App. 6a-7a. Petitioner's "failure to mention that finding—let alone challenge it—either before the BIA or in her petition [for review]," the court determined, "waives any challenge to that aspect of the IJ's ruling." *Ibid.* And because of that "unchallenged finding," the court of appeals determined that "the denial of her request for a continuance does not arbitrarily strip [petitioner] of a Congressionally-conferred benefit," and thus "does not fall within [any] exception to the general bar against jurisdiction" to review an IJ's denial of a continuance. *Id.* at 7a.

c. On November 21, 2007, petitioner filed a petition for rehearing with a suggestion of rehearing en banc. See Pet. App. 25a. On December 27, 2007, the court of appeals denied rehearing. *Id.* at 25a-26a.

d. According to the court of appeals' clerk's office, the court's mandate issued on January 4, 2008, the day on which the court issued an agency closing letter.[2] That same day, petitioner filed with the court of appeals an application for a stay of voluntary departure pending resolution of a petition for a writ of certiorari. On January 7, 2008, the court of appeals denied that application.

5. On January 9, 2008, petitioner filed with this Court an application for a stay of voluntary departure (No. 07A576) pending the filing and disposition of a petition for a writ of certiorari. On January 14, 2008, the government filed its response in opposition to the stay application. Pet. App. 43a-67a. On January 15, 2008, Justice Stevens granted petitioner's stay application, ordering that her "period of voluntary departure will be stayed pending the timely filing and disposition of her petition for writ of certiorari" as well as during any proceedings on the merits. 07A576 Docket entry (Jan. 15, 2008).

ARGUMENT

Petitioner seeks review of the court of appeals' determination that 8 U.S.C. 1252(a)(2)(B)(ii) (Supp. V 2005) precluded it from reviewing the IJ's denial of her re-

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[2] Under Federal Rule of Appellate Procedure 41(b), a court of appeals' mandate "must issue * * * 7 calendar days after entry of an order denying a timely petition for panel rehearing," but "[t]he court may shorten or extend the time." Under the normal application of Rule 41(b), therefore, the court of appeals' mandate would have issued on January 3, 2008.

quest for a continuance of her removal proceedings. Pet. i, 1, 9-21. The courts of appeals have divided on that question, but review would be premature at this time. In any event, this case would not be a suitable vehicle for addressing the existing tensions in lower court authority. Petitioner has conceded removability, has no viable claim for adjustment of status under 8 U.S.C. 1255(i), and cannot show that the IJ abused his discretion in denying a continuance. In addition, petitioner's eligibility for adjustment of status—the only form of relief she requested a continuance to permit her to pursue—is contingent on the resolution of a threshold question that is not addressed in the petition for a writ of certiorari. The petition should thus be denied.

1. a. The federal courts of appeals are in conflict regarding whether they have jurisdiction under the INA to review an IJ's denial of a continuance. In the decision below, the Seventh Circuit adhered to its earlier decision in *Ali* v. *Gonzales*, 502 F.3d 659 (2007), petition for cert. pending, No. 07-798 (filed Dec. 12, 2007), and application for stay denied, No. 07A583 (Jan. 15, 2008), which held that 8 U.S.C. 1252(a)(2)(B)(ii) (Supp. V 2005) "generally precludes judicial review" of an IJ's discretionary decision to deny a request for a continuance in removal proceedings. Pet. App. 4a (quoting *Ali*, 502 F.3d at 660). The Eighth and Tenth Circuits have reached the same conclusion. See *Onyinkwa* v. *Ashcroft*, 376 F.3d 797, 799 (8th Cir. 2004); *Yerkovich* v. *Ashcroft*, 381 F.3d 990, 995 (10th Cir. 2004). Those courts have reasoned that an IJ's decision to grant or deny a request for a continuance is a "decision or action * * * the authority for which is specified under" the relevant subchapter of the INA (8 U.S.C. 1151-1381) to be in the discretion of the Attorney General, 8 U.S.C. 1252(a)(2)(B)(ii) (Supp.

V 2005), because it is based on regulations that the Attorney General promulgated to implement 8 U.S.C. 1229a(a) and (b), the statutory provisions authorizing IJs to conduct removal proceedings, and that in turn specify that the power to grant continuances is within the discretion of IJs. *Yerkovich*, 381 F.3d at 992-993; *Onyinkwa*, 376 F.3d at 799.

The majority of circuit courts have reached a contrary conclusion. The First, Second, Third, Fourth, Fifth, and Eleventh Circuits have all concluded that a decision by an IJ to grant or deny a continuance is not a decision "the authority for which is specified" under the relevant subchapter of the INA "to be in the discretion of the Attorney General," 8 U.S.C. 1252(a)(2)(B)(ii) (Supp. V 2005), because an IJ's discretionary authority to act on a motion for a continuance is specified in a regulation, not a statutory provision within the relevant subchapter itself. See *Lendo* v. *Gonzales*, 493 F.3d 439, 441 n.1 (4th Cir. 2007); *Alsamhouri* v. *Gonzales*, 484 F.3d 117, 122 (1st Cir. 2007); *Zafar* v. *United States Attorney Gen.*, 461 F.3d 1357, 1360 (11th Cir. 2006); *Khan* v. *Attorney Gen. of the United States*, 448 F.3d 226, 232-233 (3d Cir. 2006); *Ahmed* v. *Gonzales*, 447 F.3d 433, 436-437 (5th Cir. 2006); *Sanusi* v. *Gonzales*, 445 F.3d 193, 198-199 & n.8 (2d Cir. 2006) (per curiam).[3] The Sixth Circuit has reached the same result through

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[3] Although the Ninth Circuit has not issued a published decision addressing whether the INA bars judicial review of an IJ's discretionary denial of a continuance, it has agreed with the majority position in unpublished, nonprecedential opinions. See *Lim* v. *Mukasey*, No. 05-74594, 2007 WL 4562133 at *1 (Dec. 28, 2007); *Martinez* v. *Gonzales*, 166 Fed. App'x 300 (2006); see also *Medina-Morales* v. *Ashcroft*, 371 F.3d 520, 528 (2004) (holding that Section 1252(a)(2)(B)(ii) does not preclude federal-court review of an IJ's denial of a motion to reopen).

a different analysis, concluding that "Section 1252(a)(2)(B)(ii) only applies to the portions of subchapter II left to the Attorney General's discretion, not the portions of subchapter II that leave discretion with IJs in matters where IJs are merit decision-makers that are subject to [the courts of appeals'] review." *Abu-Khaliel* v. *Gonzales*, 436 F.3d 627, 632, 634 (2006).

b. As the government concluded over a year ago, after reexamining its prior position on the issue, the majority position represents the better reading of the statute. See generally Gov't C.A. Br., *Alsamhouri, supra* (No. 05-2800), discussed at p. 15, *infra*. The relevant statutory text requires that the "authority" for the "decision or action" at issue—here, the denial of a continuance—be "specified under this subchapter [Subchapter II of Chapter 12 of Title 8] to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B)(ii) (Supp. V 2005). Nothing in the relevant statutory "subchapter," however, mentions continuances, or "specifie[s]" that they may be granted "in the discretion of the Attorney General." *Ibid.* Rather, an IJ's authority to continue a case derives from regulations promulgated to implement statutory provisions that broadly authorize IJs to conduct removal hearings, but do not specifically authorize them to grant or deny continuances. See, *e.g.*, 8 U.S.C. 1229a(a)(1). Given the general presumption in favor of judicial review, *INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001), and the terms of Section 1252(a)(2)(B)(ii) (Supp. V 2005), the government agrees with the majority of circuit courts that an IJ's discretionary decision to deny a continuance is not covered by the jurisdictional bar in 8 U.S.C. 1252(a)(2)(B)(ii) (Supp. V 2005). The government did not argue otherwise to the court below. See Gov't C.A. Br. 9 n.1.

2. As discussed above, the courts of appeals are divided with respect to the underlying question upon which petitioner seeks review. Despite petitioner's contrary assertions (Pet. 9, 12 n.6, 19-21), however, this Court's plenary consideration is not warranted at this time, because the conflict in lower-court authority may well resolve itself without this Court's intervention and because the issue concerns a narrow issue of reviewability that is unlikely to affect the outcome of many cases.

Prior to December 2006, the government had taken the position that 8 U.S.C. 1252(a)(2)(B)(ii) (Supp. V 2005) precludes federal-court review of an IJ's denial of a continuance. In December 2006, in response to a petition for rehearing in *Alsamhouri* v. *Gonzales*, 484 F.3d 117 (1st Cir. 2007), the government reconsidered its position and concluded that the view of the majority of the courts of appeals is correct. See Gov't C.A. Br. at 7-13, *Alsamhouri*, *supra* (No. 05-2800). In *Alsamhouri*, the First Circuit initially had held that it "ha[d] no jurisdiction over whether the denial of a continuance was an abuse of discretion." *Alsamhouri* v. *Gonzales*, 458 F.3d 15, 16, withdrawn on petition for reh'g, 471 F.3d 209 (2006). In response to the government's change in position, the First Circuit reversed course, "adopt[ed] the majority rule," and held that it "ha[d] jurisdiction to review a denial of a continuance." *Alsamhouri*, 484 F.3d at 122. The Eighth Circuit, which has also adopted the minority position, has suggested that it may well reconsider its holding in light of the government's recent change in position. See *Ikenokwalu-White* v. *Gonzales*, 495 F.3d 919, 924 n.2 (2007) (suggesting that "it may be appropriate for our court to revisit this issue en banc" but noting that the "present case is [not] the most appropriate vehicle for doing so").

In *Ali*, which was decided less than a month before the Seventh Circuit's unpublished decision in this case, that court acknowledged the Attorney General's recent change in position, but stated that it "disagree[d]" with the Attorney General's view. 502 F.3d at 660. The opinion further stated that it had "been circulated among all judges of [that] Court in regular active service" and that "[a] majority did not favor rehearing en banc on the question of whether the jurisdiction-stripping provision, 8 U.S.C. § 1252(a)(2)(B)(ii), applies to continuance decisions of immigration judges"; the opinion also noted, however, that four judges had voted to rehear the case en banc. *Id.* at 661 n.1.

Other developments in the Seventh Circuit since the issuance of the decision below suggest that the court may be willing to revisit the question presented en banc. On December 10, 2007, the Seventh Circuit issued an order directing the government to respond to a petition for rehearing en banc in *Potdar* v. *Keisler*, 505 F.3d 680 (2007). The threshold question raised by that petition is whether the panel erred in concluding that "it lacked jurisdiction under * * * [8 U.S.C.] 1252(a)(2)(B)(ii) to review a denial of a continuance requested by [the alien] to enable him to pursue an application for adjustment of status." Pet. on Reh'g at 1, *Potdar*, *supra* (No. 06-2441). On February 11, 2008, the government filed a response, in which it urged en banc rehearing on the issue of its jurisdiction over continuance denials. Resp. to Pet. on Reh'g at 8-13, *Potdar* (No. 06-2441) (Response).[4] There

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[4] The government's response did note, however, that there is a factual question in *Potdar* about whether the motion the IJ denied was actually a motion for a continuance. The panel in *Potdar* had held that the petitioner's motion to the IJ, which was styled a motion to terminate exclusion proceedings, "amounted to a request for a continuance" be-

accordingly is some prospect that the Seventh Circuit may reconsider its ruling on the question presented. It would thus be prudent for this Court to decline to resolve the disagreement in the circuit courts at this time.

There is, moreover, no pressing need for review by this Court because the issue concerns a narrow aspect of judicial review in the courts of appeals affecting only one procedural aspect of the conduct of removal proceedings. An IJ's denial of a motion for a continuance is reviewable by the Board only for abuse of discretion and requires a showing of substantial prejudice. *In re Villarreal-Zuniga*, 23 I. & N. Dec. 886, 891 (B.I.A. 2006). The scope of any judicial review would be at least as deferential. The question whether such judicial review is available therefore is likely to affect the outcome of very few cases, as this case amply demonstrates: The IJ manifestly did not abuse his discretion here in denying a motion for a continuance. See p. 18, *infra*. Nor is this case unusual in that respect: In fact, *all* of the previously cited decisions that found judicial review authorized, see pp. 13-14 & note 3, *supra*, *also* concluded that the denial of the alien's request for a continuance did not constitute grounds for overturning the IJ's decision. See *Lendo*, 493 F.3d at 442; *Alsamhouri*, 484 F.3d at 122; *Zafar*, 461 F.3d at 1362; *Khan*, 448 F.3d at 235; *Ahmed*, 447 F.3d at 438; *Sanusi*, 445 F.3d at 200; *Abu-*

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cause it "requested only an opportunity to pursue [adjustment of status] through appropriate administrative channels." 505 F.3d at 684-685. The government argued in its response to the rehearing petition that the panel erred in deeming the motion to terminate a motion for a continuance, Response at 6-8, but that if the court of appeals declines to revisit that issue, then the court should grant rehearing en banc on the question whether it has jurisdiction to review a continuance denial, *id.* at 8-13.

Khaliel, 436 F.3d at 634; *Lim*, 2007 WL 4562133 at *1; *Martinez*, 166 Fed. Appx. at 300. Review therefore is not warranted at this time.

3. Even if the issue were presently ripe for and warranted this Court's review, this case would be an unsuitable vehicle for resolving it, for at least three separate reasons.

a. The claim upon which petitioner sought to obtain review in the court of appeals—that the IJ abused his discretion in denying petitioner's request for a continuance—is meritless. Petitioner has conceded removability, Pet. App. 18a, and she has no entitlement to stay in this country illegally. *E.g.*, *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978). In addition, as the BIA explained, the IJ cited two independently sufficient bases for denying a further continuance. First, at the time she made her request, petitioner, despite already having had her removal hearing continued for more than seven months, was still unable to establish prima facie eligibility for adjustment of status or any non-speculative prospect of being able to do so. Pet. App. 8a-9a, 13a-14a. Second, the IJ also determined that petitioner would not merit a favorable exercise of discretion in any event because she had flagrantly violated the immigration laws by remaining in the United States illegally for nearly three years before even attempting to acquire some form of legal status. *Id.* at 9a, 13a, 14a. Because the IJ gave "a rational explanation" for his refusal to grant a continuance, and because that decision did not constitute an "inexplicabl[e] depart[ure] from established policies, or * * * rest[] on an impermissible basis," no abuse of discretion could be established here. *Castaneda-Suarez* v. *INS*, 993 F.2d 142, 146 (7th Cir. 1993) (quoting *Cor-*

doba-Chaves v. *INS*, 946 F.2d 1244, 1246 (7th Cir. 1991)).

b. Moreover, any possible error in denying a continuance would have been harmless. In order to be properly "grandfathered" under Section 1255(i), petitioner would have needed to show that the initial labor certification application filed on her behalf was "approvable when filed." 8 C.F.R. 1245.10(a)(1)(i)(B); see 8 U.S.C. 1255(i)(1)(B)(ii). "[O]n the basic facts presented," which involved nothing more than a one-page acknowledgment letter stating that an application had been filed, the IJ stated that he was unable to "find that [applicant] is even * * * eligible" for grandfathering under Section 1255(i). Pet. App. 14a.; see *id.* at 20a-21a (stating that, as of the date of her final removal hearing, it would require "speculation" to conclude that petitioner was eligible for Section 1255(i) relief). As the court of appeals correctly determined, *id.* at 6a-7a, petitioner forfeited the ability to challenge the correctness of that determination by failing to challenge it before the BIA or the court of appeals.[5] Thus, because petitioner has no legitimate claim that would permit her to remain in the United States, this Court's plenary review is unwarranted.

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[5] As she did below, petitioner *presupposes* (Pet. 4-5) that, contrary to the IJ's determination, she was "grandfathered within the terms of Section [1255](i)" and was therefore eligible to adjust her status "on the basis of a new Labor Certification." But it was *petitioner's* burden to establish her prima facie eligibility for Section 1255(i) relief, and, as noted above, the IJ expressly found in his oral ruling that petitioner had failed to do so, Pet. App. 14a, and that is how the court of appeals viewed the IJ's decision, *id.* at 6a. Petitioner does not challenge the court of appeals' reading of the IJ's decision, or its waiver holding, in her petition for a writ of certiorari, and, in any event, those sorts of case-specific determinations would not merit this Court's review.

c. Regardless of whether petitioner would have been eligible for grandfathering under Section 1255(i), moreover, her eligibility for adjustment of status is also contingent on the resolution of another threshold issue that the petition for a writ of certiorari does not meaningfully address: whether a federal court has the authority to stay the expiration of a period of voluntary departure granted by the BIA. If the answer to that question is "no," petitioner's voluntary departure period has long since expired, and she is now statutorily ineligible for adjustment of status under Section 1255. See 8 U.S.C. 1229c(d)(1)(B) (Supp. V 2005).

The government's position is that reviewing courts lack the authority to stay the expiration of a voluntary departure period, much less to extend such a period beyond the outer time limits that Congress has expressly provided for such grants of discretionary relief.[6] With respect to aliens, such as petitioner, who are granted voluntary departure at the conclusion of removal proceedings, Congress has directed that "[p]ermission to depart voluntarily * * * shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2). That strict time limitation on grants of voluntary departure reflects Congress's "intention to offer an alien a specific benefit—exemption from the ordinary bars on subsequent

[6] Although the government did not contest the court of appeals' power to grant a stay of voluntary departure in this case, the Seventh Circuit had previously issued a precedential decision holding that it has the authority to do so. See *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 654 (2004). As a result, the issue is properly before this Court. Cf. *United States* v. *Williams*, 504 U.S. 36, 44-45 (1992). In addition, to the extent that the issue of whether a court of appeals may stay the expiration of a voluntary departure period implicates a question of "adjudicatory authority," *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004), the Court would be required to consider it *sua sponte* in any event.

relief—in return for a quick departure at no cost to the government." *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004). Because the BIA already granted petitioner 60 days in which to depart voluntarily, see Pet. App. 9a-10a, any further extension of that period would exceed Congress's clear mandate.[7]

In addition, the INA and its accompanying regulations make clear that, like the power to grant voluntary departure in the first place, see 8 U.S.C. 1229c(a)(1) and (b)(1), the ability to extend an initial period of voluntary departure is vested exclusively in the Executive Branch. Whereas Congress has expressly authorized courts to order a stay of an alien's physical removal pending consideration of a petition for judicial review, see 8 U.S.C. 1252(b)(3)(B), it conferred no comparable authority to grant stays of a period of voluntary departure. To the contrary, the INA has provided since 1996 that "[n]o court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure * * * nor shall any court order a stay of an alien's removal

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[7] The INA makes clear that an alien's decision to seek judicial relief by way of a petition for review does not by itself stay or otherwise extend the period during which a grant of permission to depart voluntarily remains valid. Whereas the filing of an administrative appeal to the BIA prevents an IJ's decision from becoming final and thus prevents the commencement of a voluntary departure period, see 8 U.S.C. 1101(a)(47)(B)(i), 1229c(b)(1), an order by the BIA is final when issued, see 8 U.S.C. 1101(a)(47)(B)(i), even where (unlike here) a motion to reopen was filed, see *Stone* v. *INS*, 514 U.S. 386 (1995). In addition, Congress has declared that the filing of a petition for review with a court does not, by itself, stay even an alien's physical removal from the United States. See 8 U.S.C. 1252(b)(3)(B) ("Service of the petition [for review] on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.").

pending consideration of any claim with respect to voluntary departure." 8 U.S.C. 1229c(f). The INA further expressly provides, in its judicial review section, that "[n]otwitstanding any other provision of law (statutory or nonstatutory), including * * * sections 1361 and 1651 of [Title 28], * * * no court shall have jurisdiction to review * * * any judgment regarding the granting of relief under" the provisions authorizing voluntary departure. 8 U.S.C. 1252(a)(2)(B)(i) (2000 & Supp. V 2005). A stay of a grant of voluntary departure would necessarily entail prohibited "review" of that relief.

Moreover, a stay is granted by a court only in aid of its jurisdiction to review the merits of whatever it has stayed. See, *e.g.*, 28 U.S.C. 1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."). For that reason as well, because a court may not review an administrative determination concerning the granting of voluntary departure, it may not stay the running of a voluntary departure period. Section 1252(a)(2)(B)(i) thus further refutes any suggestion that Congress intended for courts to be able to extend a voluntary departure period, which was permitted by the Attorney General in the first place only as a matter of discretion, simply by issuing a stay. *Ngarurih*, 371 F.3d at 193. In addition, regulations issued under the INA provide that "[a]uthority to extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is only within the jurisdiction of" certain specified DHS officials. 8 C.F.R. 1240.26(f); see *ibid.* (providing that "[i]n no event can the total period of time, including any extension, exceed

120 days or 60 days as set forth in [8 U.S.C. 1229c (2000 & Supp. V 2005)]").[8]

As the government noted in its memorandum in opposition to petitioner's application for a stay of voluntary departure (Pet. App. 54a), the courts of appeals are divided with respect to whether they have the authority to stay the running of a voluntary departure period granted by the BIA. A majority of the courts of appeals have concluded that they do have such authority, at least in situations in which the request to do so is made before the voluntary departure period expires.[9] In contrast, the Fourth Circuit has held that a court of appeals lacks the power to stay or otherwise extend the period during which an alien's permission to depart voluntarily remains valid. *Ngarurih*, 371 F.3d at 194. That conflict in lower-court authority may itself warrant this Court's

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[8] The fact that courts may not stay the running of a voluntary departure period does not prevent aliens such as petitioner from obtaining judicial review of any substantive challenge that they may have to the underlying removal order. In 1996, Congress repealed a provision that had barred courts from reviewing final deportation orders of aliens who had already departed or been removed from the United States. IIRIRA § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. 1105a(c) (1994)). As a result, under current practice, an alien may comply with the terms of a voluntary departure order without forfeiting his ability to obtain judicial review of the underlying alternate removal order, see *Ngarurih*, 371 F.3d at 192-193, and this would remain true under the regulations recently proposed by the Attorney General, see note 10, *infra* (discussing proposed regulations).

[9] See *Bocova* v. *Gonzales*, 412 F.3d 257, 266 (1st Cir. 2005); *Thapa* v. *Gonzales*, 460 F.3d 323, 325 (2d Cir. 2006); *Obale* v. *Attorney Gen.*, 453 F.3d 151, 157 (3d Cir. 2006); *Vidal* v. *Gonzales*, 491 F.3d 250, 252 (5th Cir. 2007); *Nwakanma* v. *Ashcroft*, 352 F.3d 325, 327 (6th Cir. 2003); *Lopez-Chavez*, 383 F.3d at 654; *Rife* v. *Ashcroft*, 374 F.3d 606, 615-616 (8th Cir. 2004); *El Himri* v. *Ashcroft*, 344 F.3d 1261, 1262 (9th Cir. 2003).

plenary review in an appropriate case, though a recently proposed rule may limit the issue's importance going forward.[10] It should not, however, be resolved in the absence of full briefing by both parties, and in the context of a petition for a writ of certiorari that seeks to obtain plenary review solely with respect to an entirely unrelated question of immigration procedure that does not warrant review for the various reasons set out above.

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[10] On November 30, 2007, the Attorney General issued a proposed regluation addressing a number of issues related to voluntary departure. 72 Fed. Reg. 67,674. The proposed rule would expressly provide that an alien's filing of a petition for judicial review "prior to the expiration of the voluntary departure period will have the effect of automatically terminating the grant of voluntary departure." *Ibid.*; Gov't Br. 47, *Dada* v. *Mukasey*, No. 06-1181 (argued Jan. 8, 2008). Under this proposed rule, therefore, issues regarding judicial stays of voluntary departure periods would not arise.

The comment period for the proposed rule closed on January 29, 2008, and the Department of Justice is currently considering the comments. The proposed rule would "app[ly] prospectively only, that is, only with respect to immigration judge orders issued on or after the effective date of the final rule that grant a period of voluntary departure." 72 Fed. Reg. at 67,682. But the rule, if it becomes final, would eliminate the need for this Court to resolve whether, in the absence of a such a rule, the courts of appeals possess the authority to stay the running of a voluntary departure period.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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INDU GULATI,

Petitioner,

vs.

MICHAEL B. MUKASEY,
Attorney General,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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There is an undisputed, deep split that shows no sign of abating concerning the jurisdiction of federal courts to review the denial of a continuance by an Immigration Judge (IJ). The Government agrees that an immigrant has a legal right to judicial review of a continuance denial which can be an issue of immense importance that is entirely distinct from the ultimate decision to grant or deny an adjustment of status. But the Government puts the cart before the horse by claiming this case is a poor vehicle, based on speculation about the likely course of Petitioner's case if she were afforded the judicial review to which she is concededly entitled.

I. THE GOVERNMENT ACKNOWLEDGES THE SUBSTANTIAL CIRCUIT CONFLICT ON THE QUESTION PRESENTED AND, CONTRARY TO THE GOVERNMENT, THAT SPLIT SHOWS NO SIGN OF ABATING

The circuits are divided over whether 8 U.S.C. § 1252(a)(2)(B)(ii) precludes judicial review of an IJ's denial of an immigrant's request to continue removal proceedings. The Government acknowledges the conflict, noting that the Seventh, Eighth, and Tenth Circuits have held that Section 1252(a)(2)(B)(ii) "'generally precludes judicial review' of an IJ's discretionary decision to deny a request for a continuance in removal proceedings," while "[t]he majority of circuit courts have reached a contrary conclusion." Opp. at 12-13. The possibility that this conflict "may well resolve itself," *id.* at 15, because in December 2006 the Government began advocating the majority position, is remote, because, unmentioned by the Government, each of the circuits

on the minority side of the split has since expressly reaffirmed its position.

The Seventh Circuit has twice recently reaffirmed that it lacks jurisdiction over denials of a continuance. On December 27, 2007, Petitioner's request for rehearing *en banc*, expressly inviting the court to review its earlier holding on the issue, was denied. Pet. App. 25a-26a. On February 14, 2008, the Seventh Circuit again held that "we have no jurisdiction to review . . . the BIA's affirmance of the denial of a continuance." *Wood v. Mukasey*, --- F.3d ---, 2008 WL 383286, at *3 (7th Cir. 2008). [1]

The Eighth Circuit has also expressly reaffirmed its position. Though a panel of the Eighth Circuit observed in July 2007 that "it may be appropriate" for the court to reconsider its holding that it did not have jurisdiction to review the denial of a continuance, *Ikenokwalu-White v. Gonzales*, 495 F.3d 919, 924 n.2 (8th Cir. 2007), in a later decision the court expressly reaffirmed that Section 1252(a)(2)(B)(ii) "bars review of the IJ's discretionary denial of a motion to continue." *Thiam v. Gonzales*, 496 F.3d 912, 915 (8th Cir. 2007). Notably, the panel in *Thiam* cited *Ikenokwalu-White* but did *not* renew *Ikenokwalu-White*'s suggestion that en banc review might be appropriate.

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[1] There is no reason to believe that the Government's urged *en banc* rehearing on the issue of jurisdiction over continuance denials in *Potdar v. Keisler*, 505 F.3d 680 (7th Cir. 2007), Opp. at 16-17, will fare any better, especially since "a factual question in *Potdar* about whether the motion the IJ denied was actually a motion for a continuance" may prevent the court from even reaching the issue. *Id.* at 16 n.4.

Lastly, the Tenth Circuit has also at least twice reaffirmed its prior position without indicating any need for reconsideration. *E.g.*, *Kechkar v. Gonzales*, 500 F.3d 1080, 1083 (10th Cir. 2007); *Rivas v. Gonzales*, 220 F. App'x 892, 895 (10th Cir. 2007). Thus, fifteen months after the Government announced its new litigating position, it is clear that the split in the circuits remains deep and persistent.

It is equally clear that the question presented arises with extraordinary frequency and is of great importance to the just and uniform administration of the immigration laws. *See* Pet. at 19-21. The necessity for this Court's review is further demonstrated by the Government's concession that the decision below is wrong. Opp. at 14; Pet. at 18-19.

II. THE GOVERNMENT'S CLAIMED VEHICLE PROBLEMS PROVIDE NO REASON TO DENY CERTIORARI

It is at least strange that the Government, in arguing against the grant of certiorari, invites this Court to effectively conduct the appellate review of the continuance denial and then speculate about the ultimate outcome of Petitioner's effort to adjust status. The Court should decline the invitation.

A. The Claim That The Continuance Was Properly Denied

The Government opposes review because it claims that the denial of the continuance was an appropriate exercise of discretion. Opp. at 18. Even assuming this to be relevant, it is far from clear that the Government is right. After entering this country

on December 8, 1997, and applying for a labor certification on April 30, 2001, Petitioner was first under removal proceedings on August 24, 2004. Pet. App. 11a. At Petitioner's first appearance on October 27, 2004, counsel advised the IJ of Petitioner's previously filed labor certification application and her claim of eligibility for adjustment of status under the grandfather provision, 8 U.S.C. § 1255(i) (Section 245(i)). The IJ granted a continuance for further preparation until February 1, 2005.

The IJ's own scheduling issues caused the next appearance to be delayed twice, for a total of four months, first to May 24, 2005 and then to June 3, 2005. Petitioner's counsel's absence from the country led to a further two week delay until June 16, 2005, when the hearing was held. Pet. App. 19a.

This is hardly a pattern of serial delay instigated by Petitioner. And at her second, and final appearance, Petitioner submitted an acknowledgement from the State of California that it had in fact received a labor certification application filed on her behalf. Pet. App. 3a. Her request for a further continuance rested on the fact that during the four years that her initial application had sat unaddressed by the California Workforce Development Agency, her initial employer had gone out of business. *Id.* She sought additional time to arrange for the filing of a new labor certification from her new prospective employer, a practice well within the contemplation of the Section 1255(i) grandfathering provision. *See* p.5, *infra*.

B. The Claim That Her Adjustment Of Status Is Doomed To Failure In Any Event

The Government also urges the Court to deny certiorari on the ground that even if a continuance were granted, Petitioner would be unable to secure adjustment of status to that of lawful permanent resident (LPR). Opp. at 18-19. Again, the Court should decline the invitation.

When Petitioner requested a continuance, she was actively pursuing adjustment of status through two separate routes: via a new labor certification from a Chicago-based employer, Pet. App. 20a, and as the immediate relative of her son, who is married to a U.S. citizen, Pet. App. 18a. Section 245(i) contemplates that an immigrant will be able to make use of both to adjust her status. With regard to a labor certification, an immigrant "who is adjusting status through an employment-based category is not required to work for the [employer] who filed the petition that grandfathered the alien." 8 C.F.R. § 245.10(k). With regard to an immediate relative petition, a grandfathered immigrant "is not limited to seeking adjustment of status solely on the basis of the qualifying . . . application for labor certification." Interoffice Memorandum, William R. Yates, *Clarification of Certain Eligibility Requirements Pertaining to an Application to Adjust Status under Section 245(i) of the Immigration and Nationality Act* at 2, Mar. 9, 2005.[2]

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[2] This memorandum is available at http://www.uscis.gov/files/pressrelease/245iClarification030905.pdf.

Petitioner has continued to pursue both avenues to adjust her status since the Seventh Circuit denied her petition for review, and has made substantial progress on each. Petitioner's son has been granted lawful permanent resident (LPR) status, and intends to sponsor Petitioner as an immediate relative of a citizen as soon as his naturalization proceedings conclude. Congress has placed no numerical limitations on this means of acquiring LPR status. 8 U.S.C. § 1151(b)(2)(A)(i). Petitioner is also seeking a new labor certification through a new employer in Chicago.

Contrary to the Government, Opp. at 19, Petitioner did not waive or concede her right to grandfathered status under Section 245(i). *See* Application Stay Order of Voluntary Departure filed with this Court on January 8, 2008, at 10 n.3. Although dictum in the Seventh Circuit's order suggested that the IJ ruled against Petitioner on the issue of 245(i) eligibility and that she "waive[d] any challenge to that aspect of the IJ's ruling," Pet. App. 6a-7a, the hearing transcript makes clear that the IJ never decided the issue. At the hearing, before issuing his oral decision, the IJ stated: "I'm not deciding whether she has 245(i) eligibility or not . . . [A]t this time, I'm not even deciding the 245(i) eligibility issue." Pet. App. 20a-21a. In the court below, both parties recognized the issue had not been decided. *See* Pet.'s C.A. Br. 6; Resp.'s C.A. Br. 5.

The IJ's later statement that "this court does not find on the basic facts presented that [Petitioner] is even 245(i) eligible," Pet. App. 14a, is simply another indication that the IJ made *no* decision regarding the

eligibility issue. Thus, the IJ immediately went on to address the possibility that Petitioner may be 245(i) eligible: "Even if the respondent is 245(i) eligible, no [new] labor certification has been filed on her behalf and no evidence has been presented to show that it is prima facie approvable." *Id.* The IJ's statement simply shows that as a result of his own failure to continue the Petitioner's removal proceedings, he lacked facts necessary to determine Petitioner's section 245(i) eligibility.

Finally, Petitioner *did* challenge this aspect of the IJ's opinion before the circuit court. In her original merits brief, for example, Petitioner argued that she "became eligible as of April 30, 2001 to apply for adjustment of status to legal permanent residency upon approval of her application for labor certification." Pet. C.A. Br. 11.

C. The Claim That Federal Courts Lack Authority To Stay An Order Of Voluntary Departure

The Government's final argument for denying certiorari—that federal courts lack authority to stay an order of voluntary departure—is not credible or persuasive for several reasons.

First, the Government's position is at odds with its own prior conduct in this very case in filing a "statement of non-opposition" to a stay of voluntary departure in the Seventh Circuit on the 60th and final day of Petitioner's original voluntary departure period. Opp. at 9; No. 06-322, Sept. 29, 2006 Docket entry (7th Cir.). The Government thus contradicted its position that an order of voluntary departure may

never extend for more than 60 days, *see* Opp. at 20-21, and its assertion that "the ability to extend an initial period of voluntary departure is vested exclusively in the Executive Branch." *Id.* at 21.

The Government attempts to explain its action as compelled by Seventh Circuit precedent recognizing the power of courts to stay voluntary departure. Opp. at 20 n.6. But that power does not entitle one to a stay without making the required showing, and the Government in acquiescing expressly noted its view that no such showing had been made. *Id.* at 9. *See Alimi v. Ashcroft*, 391 F.3d 888, 892 (7th Cir. 2004) ("the entitlement to extra time for voluntary departure must be *demonstrated* rather than assumed") (emphasis in original); *accord Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 654 (7th Cir. 2004); *Sofinet v. INS*, 188 F.3d 703, 706 (7th Cir. 1999). Certainly, the Government could have opposed the stay in the court below, but instead it invited the Seventh Circuit to act in a manner that it now says exceeded its jurisdiction.

Second, there is no sound basis for the view that the courts of appeals lack jurisdiction to stay voluntary departure periods. That position has been rejected by eight of the nine circuits to address it,[3]

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[3] The Government principally relies on a divided decision of the Fourth Circuit in *Ngarurih v. Ashcroft*, 371 F.3d 182 (2004), in which the question at issue here was not resolved as part of the holding of the case. The issue there was whether a court of appeals could reinstate a period of voluntary departure that had already expired, not whether the court could toll an unexpired period of voluntary departure. *See id.* at 191. The Government acknowledges that the reinstatement of a voluntary departure

and is unsupported by the plain language of IIRIRA. Further, it conflicts with longstanding principles of construing ambiguities in immigration statutes in favor of the immigrant, *INS v. St. Cyr,* 533 U.S. 289, 298 (2001), and requiring a clear Congressional command for jurisdiction stripping, *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 11 (1942).

The grant or denial of a stay pending appeal is a customary part of the judicial function. *See* FED. R. APP. P. 8(a)-(b); *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) ("power to stay proceedings is incidental to the power inherent in every court to control the disposition of" cases before it).

IIRIRA precludes appellate review of decisions to grant, 8 U.S.C. § 1252(a)(2)(B)(i),[4] or deny, § 1229c(f),[5] voluntary departure. Thus, courts may not review the executive branch judgment about whether an immigrant met the statutory qualifications for a voluntary departure. It does not limit courts' power to toll the voluntary departure period in order to provide time to conduct appellate review of any issues over which they do have

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period is a substantially different issue than the power to stay one that has not yet run. Opp. at 23 & n.9.

[4] "Notwithstanding any other provision of law, . . . no court shall have jurisdiction to review—(i) any judgment regarding the *granting* of [voluntary departure]." 8 U.S.C § 1252(a)(2)(B) (emphasis added).

[5] "No court shall have jurisdiction over an appeal from *denial* of a request for an order of voluntary departure . . . nor shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure." 8 U.S.C. § 1229c(f) (emphasis added).

jurisdiction. As Judge Higginbotham noted: "[courts] issue a stay [of voluntary departure] to consider an alien's challenge to the executive's determination of removability, not its determination with respect to voluntary departure." *Vidal v. Gonzales*, 491 F.3d 250, 253 (5th Cir. 2007).

The Government also argues that 8 C.F.R. § 1240.26(f), which grants three particular officials—and only them—power to extend the time to depart voluntarily, supports their claim that authority to stay voluntary departure has been stripped from the federal appellate courts. Opp. at 22. Apart from the fact that no regulation could resolve the issue of jurisdiction one way or the other, this regulation on its face describes the authority that exists within the executive branch, and does not purport to address authority of courts. Judicial authority to issue stays of voluntary departure comes from 8 U.S.C. § 1252(a)(1): "Judicial review of a final order of removal . . . is governed only by chapter 158 of Title 28," which provides "the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition." 28 U.S.C. § 2349(b); *see Vidal*, 491 F.3d at 253.

Finally, the Court need not address this argument in order to reach the question presented here. A federal court of appeals and a Justice of this Court have already expressly decided this issue in the context of this case. These decisions are clearly sufficient to establish that this argument has been rejected as law of the case. *Agostini v. Felton*, 521 U.S. 203, 236 (1997). The Government's very weak

effort to call jurisdiction into doubt should not distract the Court. The essence of the Government's argument is that meaningful appellate review in an Article III court is unavailable once an order of voluntary departure has been entered, and further, that this Court must view as "off limits" any issue arising in a case where the petitioner was previously granted a stay of voluntary departure. Absent clear statutory language precluding the courts from tolling an order of voluntary departure—which is wholly lacking—this Court should not presume that Congress intended this bizarre and possibly unconstitutional result. *See St. Cyr*, 533 U.S. at 298.[6]

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[6] The question presented by *Dada v. Mukasey*, No. 06-1181 (argued Jan. 8, 2008), is distinct from the issue raised by the Government now. *Dada* concerns whether "the filing of a motion to reopen removal proceedings" before the Attorney General "automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure." No. 06-1181, Sept. 25, 2007 Docket entry (U.S.). Here, the Government's argument concerns the federal courts' authority to toll an order of voluntary departure. Consequently, there is no reason to hold this petition for *Dada*.

CONCLUSION

The petition for a writ of certiorari should be granted.

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